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Supreme Court, U.S.
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No. ________

In The
Supreme Court of the United States

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CHRISTOPHER MORA,

Petitioner,

v.

JOE WILLIAMS,

Respondent.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether trial counsel's continued representation of Mora after the state alleged that counsel and Mora were involved in criminal activity together constituted a per se violation of Mora's constitutional right to the effective assistance of counsel?

2. Whether the court of appeals' holding that sufficient evidence supported Mora's felony-murder conviction – which the appellate court noted was based on "several inferences" from purely circumstantial evidence – conflicts with *Jackson v. Virginia*, 443 U.S. 307 (1979)?

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PETITION FOR A WRIT OF CERTIORARI

Christopher Mora petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

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OPINIONS BELOW

The New Mexico Supreme Court's opinion affirming Mora's conviction on direct appeal (App. 71-106) is reported at 124 N.M. 346, 950 P.2d 789. The state district court's order denying Mora's petition for a writ of habeas corpus (App. 55-56) is unreported. The New Mexico Supreme Court's order granting Mora's petition for a writ of certiorari on his state habeas petition (App. 53-54) is reported at 129 N.M. 385, 9 P.3d 68. The New Mexico Supreme Court's order quashing its writ of certiorari (App. 49-50) is reported at 130 N.M. 255, 23 P.3d 930.

The order of the district court denying Mora's petition under 28 U.S.C. § 2254 (App. 30-32) is unreported. The opinion of the court of appeals denying Mora's appeal of the denial of his petition (App. 1-29) is unreported.

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JURISDICTION

The court of appeals entered its opinion affirming the denial of Mora's petition under 28 U.S.C. § 2254 on August 31, 2004. App. 1-29. Mora invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

U.S. Const. Amend. XIV, Section 1 provides in relevant part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law.

Section 2254 of Title 28, United States Code, provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

Section 30-2-1 of the New Mexico Statutes provides in relevant part:

> A. Murder in the first degree is the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused:
>
> . . .

(2) in the commission of or attempt to commit any felony[.]

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STATEMENT OF THE CASE

On November 24, 1994, Thanksgiving Day, Christopher Mora and Andrea Garcia, both of whom were nineteen-years-old, were living with Garcia's twenty-three-month-old daughter, Christina. Tr. 1/22/96, 177-79, 193; 1/30/96, 49. Christina was admitted to the hospital with a severe head injury that morning and died the next day. Tr. 1/29/96, 41-42.

The state charged Mora with criminal sexual penetration of a minor, intentional child abuse resulting in death, negligent child abuse resulting in death, and felony murder. RP 1-2. Leon Taylor and Clifford McIntyre represented Mora before and during his trial.

The evidence showed that severe head trauma caused Christina's death, but the circumstances surrounding the fatal head injuries are largely unknown. A CAT scan, surgery, and the autopsy revealed recent severe head soft tissue injuries, a skull fracture, and old blood clots "consistent with previous episodes of trauma." Tr. 1/24/96, 210-33; 1/25/96, 42, 58; 1/26/96, 18-20; 1/29/96, 68, 112. Older trauma to the cheek area, which was unrelated to the head injury, was also evident. Tr. 1/26/96, 20, 25; 1/29/96, 75-6. The older blood in Christina's head could not be dated but was considerably more than one week old. Tr. 1/26/96, 51; 1/29/96, 76. The operating physician opined that the fatal head trauma occurred within twenty-four hours. Tr. 1/24/96, 224, 228. The fatal injuries could have been caused by shaking, direct impact, or both. Tr. 1/24/96, 216-17. Christina would have lost consciousness upon receiving the blow that caused her death. Tr. 1/26/96, 28-29.

When Christina arrived at the emergency room on November 24, the treating physician noted "a scratch mark in [her] perineum," the area between the vagina and the anus. Tr. 1/24/96, 162, 180-81. The doctor had no idea how the scratch got there or what caused it. Tr. 1/24/96, 182. A nurse charted a tear one centimeter above the rectum, between the vagina and the rectum. Tr. 1/25/96, 16, 26-7. The nurses testified they saw no trauma to Christina's vaginal area and no bleeding. Tr. 1/25/96, 20, 24, 26, 27. Neither the intensive care physician nor the nurses saw any vaginal or paravaginal bruising. Tr. 1/25/96, 69; 1/29/96, 145, 149-50. The intensive care physician noted "a small laceration in [Christina's] skin" that required no medical intervention. Because he thought it was "tough to explain how it got there," the intensive care physician consulted with Dr. Ornelas. Tr. 1/25/96, 44, 52.

Dr. Ornelas examined Christina. Tr. 1/26/96, 116. Although no one else saw any bruising, she noted petechiae – tiny dots of blood under the skin – and bruising on the side of the vagina. Tr. 1/26/96, 116, 120-21. Dr. Ornelas testified that what the other medical personnel had previously noted as a scratch or a tear was "a large tear, deep tear." Tr. 1/26/96, 121. In her opinion, Christina had been anally raped with a large object, causing the perineal skin to tear. Tr. 1/26/96, 133-35. She told the jury Christina was injured less than twenty-four hours before her examination. Tr. 1/26/96, 142.

Dr. Wilkie, an emergency room physician, testified for the defense that the pathologist's slides showed a small cut between Christina's vagina and rectum that appeared to be approximately one week old because it showed signs of healing for several days. Tr. 1/29/96, 79-80, 113. The only measurement of the cut was in the autopsy report, which described it as three-tenths of an inch long and one-tenth of an inch deep. Tr. 1/29/96, 84, 86. Dr. Wilkie testified that Christina's injury was inconsistent with anal penetration. He also pointed out that the autopsy report contained no evidence of any bruising or petechiae. Tr. 1/29/96, 76, 87. If petechiae had been present when Dr. Ornelas examined Christina, they would not have disappeared by the time of the autopsy. *Id.* at 108. Dr. Wilkie explained that the red marks Dr. Ornelas had seen could have been caused while Christina was in the hospital just before her death or on previous days, due to an unrelated illness. During the days preceding her death, suppositories had been placed in her rectum. On November 24, emergency room personnel applied pressure to Christina's perineal skin to open up the genital area to insert a catheter. *Id.* at 79-80. On November 23, the day before Christina's fatal injury, while she was at the hospital due to an illness, a nurse had used adhesive to hold a cup around Christina's genital area to catch urine. Tr. 1/24/96, 66-7, 91. Dr. Wilkie opined that there was no evidence that Christina had been sexually abused. Tr. 1/29/96, 87-88. The state introduced no other evidence of current or previous sexual abuse.

Mora testified that he and Garcia were having sex on the morning of November 24 when Christina woke up. Tr. 1/30/96, 60. Garcia did not want to tend to the crying baby, but Mora insisted that she do so. *Id.* at 61. Still in the bedroom, Mora heard Christina, who was in the living room watching television with Garcia, cry or scream. Suddenly, Cristina was silent. *Id.* When Mora entered the living room, Garcia gave him "a weird, scared look." *Id.* Then Garcia asked Mora to watch Christina, who appeared to be sleeping in her stroller, while Garcia took a shower. *Id.* at 61-62. When the phone rang, Mora went into the bedroom to answer it. *Id.* at 62. After talking on the telephone, Mora moved Christina, who was still sleeping, to her bed. Tr. 1/26/96, 80-83; 1/30/96, 60-62, 99-109. Garcia emerged from the bathroom while Mora was walking down the hall carrying Christina. Tr. 1/22/96, 218; 1/26/96, 82; 1/30/96, 62.

Garcia testified that she woke up and then watched a Thanksgiving parade on the living room television with Mora and Christina. Tr. 1/22/96, 212-14. According to Garcia, she then showered, leaving Mora to care for Christina, who Garcia claimed was awake. *Id.* at 214-16. Garcia testified that when she emerged from the bathroom after her shower, she saw Mora walking down the hall with Christina on his shoulder, and that Mora said he was putting Christina to bed because she was asleep. *Id.* at 216-18. Garcia thought this odd because Christina did not usually fall asleep so soon after waking up. *Id.* at 218. Because Christina appeared to be sleeping, Garcia continued to dress herself. *Id.* at 218-19.

When Mora and Garcia realized Christina was not breathing, Garcia called 911. Tr. 1/26/96, 83. Mora and Garcia attempted to revive Christina until rescue personnel arrived. Tr. 1/30/96, 63-64. When the paramedics arrived, Mora was holding Christina, and Garcia was in another room. *Id.* Mora explained to a paramedic that Christina was having trouble breathing. Tr. 1/24/96, 110.

Then Garcia explained that Christina sustained the bruises on her forehead and shoulder when she fell off the bed three days earlier. *Id.* at 117, 122, 127-30. The paramedic thought Garcia was being evasive. *Id.* at 134.

Immediately before Mora was to testify, the prosecutor accused trial counsel of attempting to suborn perjury from Mora. In chambers, with Mora present, the prosecutor told the court a detective had overheard Taylor, in the presence of McIntyre, tell Mora he was going to have to lie. Tr. 1/30/96, 30-32. Although the prosecutors had been aware of the detective's allegation for several days, they did not inform the court until immediately before Mora was to take the stand. *Id.* at 31-32. The prosecutor told the court he intended to call the detective in rebuttal if Mora testified. *Id.* at 32-34. In response, Taylor, having been accused of committing a crime, angrily asserted *his* right to confront the detective. *Id.* at 31. Taylor recognized the personal ramifications of the accusation that he told Mora to lie and insisted, "I have never, ever, in my entire career of 30 some odd years ever told a client that. . . ." *Id.* at 37.

Neither Taylor nor McIntyre gave Mora any advice before the in-chambers conference began. They did not inform Mora that Taylor and Mora had been accused of committing a crime together; did not advise Mora of *Mora's* constitutional right not to incriminate himself; and did not offer *any* explanation for the in-chambers meeting. Instead, without concern for the attorney-client privilege or for Mora's constitutional rights, and in the presence of the judge and the prosecutors, Taylor instructed Mora to speak on *Taylor's* behalf: " . . . for the record . . . state whether or not I have ever told you to lie. Have I?" Tr. 1/30/96, 34. McIntyre added, "This is outrageous, Judge. This is outrageous . . ." *Id.* at 37. Further expressing concern for the counsel's own interests, Taylor then threatened to sue the police detective and both prosecutors for defamation. *Id.* The trial court did not investigate the conflict and refused to rule on the prosecutor's request to call the officer until *after* Mora took the stand. *Id.* at 38.

The trial court did not inform Mora about Taylor's conflicting interests. Nor did anyone explain to Mora the implications of Taylor continuing to represent him under the circumstances. Counsel did not seek to withdraw. Instead, laboring under this conflict of interest, Taylor forged through the remainder of the case.

The jury acquitted Mora of both counts of criminal sexual penetration of a minor, but convicted him of criminal sexual contact of a minor, child abuse resulting in death, and felony murder with criminal sexual contact as the underlying felony. App. 71, 107-08. The trial court imposed a life sentence. *Id.*

Represented by undersigned counsel, Mora appealed. The New Mexico Supreme Court reversed his conviction for child abuse resulting in death on double jeopardy grounds, but affirmed his felony murder and criminal sexual contact convictions. App. 71-106. The state district court amended the judgment and sentence to conform to the state supreme court's opinion. App. 68-70.

Mora filed a habeas petition in state district court. The court denied the petition after an evidentiary hearing. App. 55-56 (order denying petition); 57-67 (findings of fact and conclusions of law). The New Mexico Supreme Court granted Mora's petition for a writ of certiorari on the issue of Taylor's conflict of interest, App. 51-54, but quashed the writ after full briefing and oral argument, App. 49-50.

Mora filed a habeas petition pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of New Mexico. The district court dismissed the petition with prejudice without holding an evidentiary hearing and denied Mora a certificate of appealability. App. 34-48 (magistrate judge's proposed findings and recommended disposition); 30-32 (order adopting magistrate judge's proposed findings with modifications and adopting magistrate judge's proposed disposition); App. 33 (final judgment).

The Tenth Circuit Court of Appeals granted Mora's application for a certificate of appealability. After briefing and oral argument, the court of appeals affirmed the dismissal of Mora's federal habeas petition. App. 1-29.

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REASONS FOR GRANTING THE WRIT

The Court should grant the writ because the decision of the court of appeals conflicts with decisions of the Court of Appeals for the Second Circuit interpreting the Sixth Amendment, and with this Court's decisions interpreting the Due Process Clause of the Fourteenth Amendment.

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE A SPLIT AMONG THE FEDERAL CIRCUITS REGARDING THE LEGAL STANDARD GOVERNING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS BASED ON CONFLICTS OF INTEREST ARISING FROM COUNSEL'S ALLEGED INVOLVEMENT IN CRIMINAL ACTIVITY WITH HIS CLIENT.

Just before Mora was to take the stand in his own defense, the state alleged, based on a detective's observations, that Mora's counsel had attempted to suborn perjury from Mora.[1] Citing *United States v. Fulton*, 5 F.3d 605 (2d Cir. 1993) and *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984), Mora argued in the court of appeals that a per se violation of his constitutional right to effective assistance of counsel occurred when trial counsel continued to represent Mora after the state alleged that counsel was involved in criminal activity with Mora.

The court of appeals refused to apply the Second Circuit's per se rule because (1) the Tenth Circuit has not adopted the per se rule; (2) the Seventh Circuit has explicitly rejected the per se rule; and (3) the per se rule might not be viable after *Mickens v. Taylor*, 535 U.S. 162 (2002). App. 18 n.4. Applying *Mickens* and its progenitor, *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the appellate court rejected Mora's conflict-based ineffective assistance claim on the ground that the record contained no evidence that the conflict adversely affected Mora's representation at trial.[2] App. 18-20.

The Tenth Circuit's opinion highlights the split among the circuit courts of appeals with respect to the proper analytical approach to ineffective assistance claims based on conflicts arising from allegations that counsel and his client were involved in criminal activity together. With its decision in this case, the Tenth Circuit joins the Seventh Circuit in applying the *Sullivan-Mickens* rule to this brand of ineffective assistance claim. *See United States v. Wallace*, 276 F.3d 360, 368 (7th Cir. 2002) (requiring "the defendant [to] show some adverse effect on his representation stemming from his counsel's conflict"). By contrast, rather than requiring proof of adverse effect, the Second Circuit holds that this type of conflict constitutes a per se violation of a defendant's constitutional right to the effective assistance of counsel. *See Fulton*, 5 F.3d at 611 (holding that per se violation of Sixth Amendment right to effective assistance of counsel occurs when counsel is involved in defendant's crimes); *Cancilla*, 725 F.2d at 870 (holding that conflict based on counsel's concern for his own criminal liability constitutes per se violation of defendant's Sixth Amendment right to effective assistance of counsel). These conflicting approaches stem from the appellate courts' disparate readings of this Court's opinion in *Sullivan*.

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[1] In New Mexico, a lawyer who attempts to suborn perjury is subject to professional discipline. *See* Rule 16-804(B) NMRA 2004 (professional misconduct); Rule 17-205 NMRA 2004 (discipline). Suborning perjury is also a crime. *See* 18 U.S.C. § 1503.

[2] In *Sullivan*, this Court held that in order to prevail on an ineffective assistance claim based on a conflict of interest arising from counsel's concurrent representation of multiple defendants in related cases, a defendant must establish that "an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 348-49. *Mickens* confirmed that only "a conflict *that affected counsel's performance*" triggers a presumption of prejudice in multiple representation cases, and that "a mere theoretical division of loyalties" is insufficient. 535 U.S. at 171.

In *Cancilla,* the Second Circuit read *Sullivan* narrowly, holding that its adverse effect rule does not apply to conflicts rooted in counsel's "concern over getting [him]self into trouble with criminal law enforcement authorities," and that this type of conflict constitutes "a per se violation of the Sixth Amendment right to effective assistance of counsel." 725 F.2d at 870. The Second Circuit harmonized its per se rule and the *Sullivan* rule, which the Court concluded was crafted to address "the effect of multiple representation, a situation that invariably raises the possibility of harmful conflict that often does not exist in fact." *Id.* Unlike conflicts arising from multiple representation, the Second Circuit reasoned that conflicts arising from counsel's interest in avoiding criminal prosecution are "always real, not simply possible," and are "so threatening as to justify a presumption that the adequacy of representation was affected." *Id.* In *Fulton*, the Second Circuit reaffirmed its conclusion regarding *Sullivan*'s limited applicability and the relationship between *Sullivan*'s adverse effect rule and the per se rule of *Cancilla*. 5 F.3d at 611. The Tenth Circuit's opinion in this case suggests that the per se rule might not be viable after *Mickens*, App. 18 n.4, but the Second Circuit appears to disagree, *see United States v. Jones*, 381 F.3d 114, 119 (2d Cir. 2004) (citing *Fulton* favorably after *Mickens*).

The Seventh Circuit has squarely rejected the Second Circuit's description of *Sullivan*'s scope. *See Wallace*, 276 F.3d at 368 ("To the extent that Wallace is implicitly inviting us . . . to adopt the *Cancilla* approach, we decline the overture."). In *Wallace*, the Seventh Circuit held that *Sullivan*'s adverse effect rule applies to ineffective assistance claims based on conflicts arising from (1) counsel's representation of multiple parties with conflicting interests, and (2) counsel's alleged involvement in criminal activity with his client. *See id*; *see also United States v. Scarfo*, 980 F. Supp. 803, 806 (E.D. Pa. 1997) ("The Second Circuit's holding in *Fulton*, which requires reversal upon the showing of an actual conflict of interest, without any adverse effect requirement, is at odds with the standard enunciated by the Supreme Court in *Cuyler* [*v. Sullivan*] and followed by this circuit.").

The Tenth Circuit's tentative suggestion in this case that *Mickens* casts doubt on "the remaining viability of a per se rule," App. 18 n.4, merely confirms what the disagreement between the Second Circuit and the Seventh Circuit revealed. Neither *Sullivan* nor *Mickens* clearly describes the scope of the adverse effect rule. In *Mickens*, the Court acknowledged that it had not defined the scope of the adverse effect rule beyond its applicability to multiple representation cases. However, the Court suggested, in dictum, that the appropriate rule for each category of conflict-based ineffective assistance claim might depend on the "probability of prejudice arising from" the particular type of conflict at issue, and "the difficulty of proving that prejudice." *Mickens*, 535 U.S. at 175.

In the wake of *Sullivan* and *Mickens*, the federal courts have reached different conclusions about when to apply the adverse effect rule. Some federal courts apply the rule to all conflict-based ineffective assistance claims. Others apply the adverse effect rule to claims based on multiple representation, but apply a per se ineffective assistance rule to claims based on counsel's alleged involvement in criminal activity with his client. This Court should grant the petition to clarify the reach of its holdings in *Sullivan* and *Mickens*, so that the federal courts can approach this important constitutional issue uniformly.

II. THE COURT SHOULD GRANT THE PETITION BECAUSE THE COURT OF APPEALS' DECISION CONFLICTS WITH *JACKSON V. VIRGINIA*.

Mora argued in the court of appeals that his felony-murder conviction is invalid under the Due Process Clause of the Fourteenth Amendment because the evidence would not allow a rational jury to conclude beyond a reasonable doubt that Mora caused Christina's death while committing a dangerous felony. This Court has held that the appropriate sufficiency of evidence inquiry in a federal habeas corpus proceeding is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In New Mexico, one of the essential elements of felony murder is that the defendant killed the victim during the commission or attempted commission of a dangerous felony. *See State v. Campos*, 122 N.M. 148, 154, 921 P.2d 1266, 1272 (holding that felony murder requires proof that "the murder [was] committed in the course of a dangerous felony"); NMSA 1978, § 30-2-1(A)(2) (1994) (defining felony murder as killing of a human being "in the commission of or attempt to commit any felony"). Even when viewed "in the light most favorable to the prosecution," *Jackson*, 443 U.S. at 319, the evidence would not allow a rational jury to conclude beyond a reasonable doubt that Mora committed felony murder by inflicting both Christina's perineal injury and her fatal head injury while Garcia was in the shower. Yet the court of appeals accepted the state's theory that the evidence would have allowed a rational jury to conclude beyond a reasonable doubt that while Garcia was in the shower on the morning of November 24, Mora committed sexual contact of Christina, injuring her perineum, and then inflicted her fatal head injury. The appellate court failed to distinguish between the state's speculative conclusions about what might have happened to Christina, and conclusions beyond a reasonable doubt based on "reasonable inferences" from the evidence. *Jackson*, 443 U.S. at 319.

The record lacks sufficient evidence of the timing of Christina's perineal injury, which the autopsy report described as a laceration three-tenths of an inch long and one-tenth of an inch deep. App. 30, ¶ 1. The court of appeals relied on four pieces of circumstantial evidence: (1) Dr. Ornelas' testimony that the injury was recent; (2) testimony that the injury was not present on November 23; (3) Garcia's testimony that she did not notice the injury in the early morning of November 24; and (4) the testimony of hospital personnel that they noticed the injuries when Christina arrived at the hospital on November 24. App. 14. At best, this evidence only proves that Christina suffered the perineal injury sometime during the morning of November 24. However, it would not allow a rational jury to conclude beyond a reasonable doubt that Mora inflicted the injury while Garcia was in the shower, or that the perineal injury and the head injury occurred at or around the same time.

In lieu of record evidence that would prove beyond a reasonable doubt that Mora inflicted both the head injury and the perineal injury while Garcia was in the shower, the state relied on a speculative time-pressure theory to draw a temporal connection between the two injuries. Dr. Ornelas described the perineal injury as a tear that could only have been caused by penetration, Tr. 1/26/96 at 121, 134, but the jury rejected Dr. Ornelas' conclusion when it found Mora not guilty of criminal sexual penetration, App. 31, ¶ 3; App. 71. Yet, based on Dr. Ornelas' testimony that a child who suffered a perineal injury like Christina's would cry out in pain, the state theorized that *if* Mora had inflicted the perineal injury while Garcia was in the shower, Christina would have cried, causing Mora to panic and inflict Christina's head injury to silence her, so that Garcia would not hear Christina crying. App. 13. The court of appeals also relied on Dr. Ornelas' rejected opinion, adopting the time-pressure theory, which it described as consisting of "several inferences" from purely circumstantial evidence. App. 13. But the record is devoid of evidence that Mora inflicted the perineal injury while Garcia was showering; that Christina cried while Garcia was showering; that Mora panicked; or that Mora shook or struck Christina to silence her. Although the sequence of events in the state's time-pressure theory rests solely on speculation, not on "reasonable inferences" drawn "from basic facts to ultimate facts," *Jackson*, 443 U.S. at 319, the court of appeals concluded that the evidence was constitutionally sufficient under *Jackson*.

Unlike the Tenth Circuit, which has deeply eroded the *Jackson* standard, as evidenced by its opinion in this case, the Fourth Circuit recognizes that the *Jackson* standard is "rigorous." *Evans-Smith v. Taylor*, 19 F.3d 899, 905 (4th Cir. 1994). In *Evans-Smith*, the Fourth Circuit correctly drew the constitutional line between convictions based on speculation and those based on "reasonable inferences." *Jackson*, 443 U.S. at 319. Faced with a post-conviction *Jackson* challenge to a state murder conviction based on "entirely circumstantial" evidence, *Evans-Smith*, 19 F.3d at 900, the Fourth Circuit reversed the district court's denial of the post-conviction motion, *see id.* at 910 ("We are unable to conclude that any rational trier of fact could have found Evans-Smith guilty beyond a reasonable doubt."). The Court rejected the prosecution's reliance on multiple tenuous inferences from the circumstantial evidence. *See, e.g., id.* at 908 n.25 ("Once again, what is required here, in order to find for the Commonwealth, is a kind of double inference."). While recognizing that "circumstantial evidence need not exclude every reasonable inference of innocence," the Fourth Circuit drew a crucial distinction the Tenth Circuit ignored:

> To start with the assumption that the crime was committed and then to show that each piece of circumstantial evidence can be explained in a consistent manner is fundamentally different from examining each piece of evidence and finally concluding beyond a reasonable doubt that the defendant was guilty. The prosecution has attempted to accomplish only the first alternative, not the second.

Id. at 910.

Had the Tenth Circuit adhered to *Jackson* in this case, it would have recognized that the time-pressure theory fails the *Jackson* test just as miserably as the prosecution's theory in *Evans-Smith*. Just as the prosecution in *Evans-Smith* reasoned backward from the conclusion that Evans-Smith committed murder, the court of appeals reasoned backward from the conclusion Mora fatally injured Christina while sexually abusing her, using the time-pressure theory to connect the injuries in time in a manner that is consistent with the scant circumstantial evidence. The court of appeals' theory is merely an attempt to explain – based on conjecture rather than "reasonable inferences" from evidence – how Mora *could* have inflicted the fatal head injury while sexually abusing Christina. *Jackson*, 443 U.S. at 319. However, that theory could not have allowed a rational jury to reach a "subjective state of near certitude" that Mora committed felony murder by causing Christina's death while sexually abusing her. *Jackson*, 443 U.S. at 315.

The court of appeals' decision rests on speculation about what *might* have happened, not on "reasonable inferences" from the evidence that would allow a jury to determine beyond a reasonable doubt what *must* have happened. *Id.* at 319. The Court should grant the petition to elucidate and emphasize this crucial distinction, as the Fourth Circuit did in *Evans-Smith*, so that every federal court will give meaning to the fundamental constitutional guarantee this Court announced in *Jackson*.

◆

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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November 2004

CHRISTOPHER MORA, Petitioner-Appellant, v. JOE WILLIAMS, Warden, Lea County Correctional Facility, Respondent-Appellee.

No. 02-2216

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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COUNSEL: For CHRISTOPHER MORA, Petitioner-Appellant: Nancy Hollander, Freedman, Boyd, Daniels, Hollander, Goldberg & Cline, Albuquerque, NM; Gary W. Nelson, Albuquerque, NM.

For JOE WILLIAMS, Warden, Lea County Correctional Facility, Respondent-Appellee: Patricia A. Madrid, Office of the Attorney General, State of New Mexico, Albuquerque, NM; Arthur W. Pepin, New Mexico Attorney General's, Santa Fe, NM.

JUDGES: Before SEYMOUR, BALDOCK, and O'BRIEN, Circuit Judges.

OPINION BY: Terrence L. O'Brien

OPINION:

ORDER AND JUDGMENT*

Paramedics transported the limp and unresponsive body of twenty-three month old Christina Sierra to the emergency room Thanksgiving Day morning, November 24, 1994. Christina was pronounced dead the next morning at 11:00 a.m. The cause of death was severe head trauma. Only two people were present in the hours immediately preceding her injury – Andrea Garcia, the child's mother, and Christopher Mora, Garcia's live-in boyfriend. Each accused the other of being alone with Christina with the opportunity to cause the injury leading to her death. Mora was arrested and charged with Christina's death.

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* This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After an eight day jury trial, Mora was convicted of felony murder (with criminal sexual contact of a minor as the underlying felony offense), criminal sexual contact in the third degree, and intentional child abuse resulting in great bodily harm or death. On appeal to the New Mexico Supreme Court, his conviction of intentional child abuse resulting in death was vacated. *State v. Mora,* 1997 NMSC 60, 124 N.M. 346, 950 P.2d 789, 805-06 (N.M. 1997). The court concluded "the convictions for both felony murder and intentional child abuse resulting in death would result in double jeopardy." *Id.* at 800. However, his convictions for felony murder and criminal sexual assault were affirmed. *Id.* at 805.

Mora then filed a petition for writ of habeas corpus in state court, which was denied after an evidentiary hearing. His petition for writ of certiorari to the New Mexico Supreme Court was granted on a single issue, whether Mora's counsel had a conflict of interest. The writ was quashed after full briefing and oral argument.

After exhausting his state remedies, Mora petitioned for a writ of habeas corpus under 28 U.S.C. § 2254(a) to the United States District Court for the District of New Mexico, asserting the same grounds for relief presented to the state court: (1) insufficiency of the evidence for both the felony murder and the criminal sexual contact convictions, and (2) ineffective assistance of counsel based on counsel's conflict of interest, failure to recall a witness, and the failure to make pertinent objections at trial. The district court denied his petition as well as his subsequent request for a certificate of appealability (COA). We granted a COA to consider the full merits of his habeas petition. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253, we AFFIRM.

FACTUAL BACKGROUND

Mora moved into Garcia's apartment in September 1994. Garcia's mother, Virginia Saavedra, also lived with Garcia until mid-October 1994. In November 1994, Christina, a previously healthy baby, began suffering from a multitude of illnesses, which included bruises, herpes dermatitis (blisters in the mouth), respiratory infection, and pneumonia symptoms. These illnesses caused Christina to be seen by her doctors several times, including a hospital stay from November 13 through 17, 1994, and a visit to the medical clinic on November 23, the day before her fatal injury.

At trial, Garcia and Mora gave conflicting testimony about what occurred in the hours just before Christina's injury. Garcia testified Christina, although still ill, was otherwise talking and acting normally on Thanksgiving morning. Garcia stated she and Mora got out of bed at the same time. She went to change Christina's diaper in the bedroom, then all three watched the Thanksgiving parade on the television in the living room. After about an hour, Garcia left Christina with Mora while Garcia showered for her normal twenty to twenty-five minutes. As Garcia left the bathroom, she saw Mora walking down the hall carrying Christina. He said he was putting her to bed because she fell asleep. Garcia thought this was odd because Christina did not nap in the morning. However, upon quickly peeking in the bedroom, Christina appeared to be sleeping. Later, after Garcia spoke with her mother on the telephone, she asked Mora to fix an egg for Christina while she went to get the child out of bed. Instead, Mora went with her to the bedroom. Both observed that Christina was alarmingly lethargic and unresponsive. Garcia called 911 and the paramedics arrived shortly thereafter.

Mora's testimony about the facts prior to the arrival of the ambulance differs. He testified he and Garcia were having sex when Christina began crying. He insisted Garcia tend to Christina, even though she did not want to. Christina was crying loudly as Garcia took her to the living room. From the bedroom, he heard Christina cry or scream and then become silent. When he went into the living room approximately twenty minutes later, it appeared Christina was sleeping in her stroller. Garcia gave him a "scared look." (2d Supp. App., Vol. VII at 60.) Garcia went to the kitchen and made cereal for Christina, but the child would not eat. Garcia then told him she was going to take a shower. Soon after Garcia left the room, he received a call from his friend, Joseph Sena, whom he spoke with for about ten minutes. Later, Mora put Christina in her bed because she was still sleeping. After Garcia finished dressing and went to wake Christina, Mora went to the kitchen to make an egg for the child. There, he heard Garcia loudly tell Christina to get up. He went into Christina's room to find out what was wrong. Seeing Christina was very pale, he uncovered her and saw she was having difficulty breathing. He told Garcia to call the ambulance.

What happened during the remainder of the day is uncontested. Garcia accompanied Christina in the ambulance, while Mora dressed and arrived at the hospital about forty minutes later. Doctors and nurses in the emergency room discovered Christina had severe head trauma and a tear or scratch on her perineum (the flesh between the vaginal and anal openings.) Dr. Nevin Baldwin, the attending neurosurgeon, operated at approximately 11:00 a.m. to remove the blood clot caused by the head trauma. After surgery, Christina was taken to the intensive care unit where medical personnel notified Dr. Robert Katz, the director of the pediatric unit, of the tear on Christina's perineum. Dr. Katz performed an examination and then called Dr. Renee Ornelas, a pediatric sexual abuse expert, to do a more thorough exam. Christina died from her head injury the next day.

DISCUSSION

I. Standard of Review

All of Mora's appellate claims were adjudicated on the merits in state court. Therefore, we grant habeas relief only if Mora can establish the state court's decision was: (1) " 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,' " or (2) " 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.' " *See Spears v. Mullin,* 343 F.3d 1215, 1225 (10th Cir. 2003) (quoting 28 U.S.C. § 2254(d)(1) and (2) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), *cert. denied,* 158 L. Ed. 2d 255, 124 S. Ct. 1615 (2004). Further, we presume the state court factual findings are correct and place the burden on Mora to rebut this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

II. Sufficiency of the Evidence

Mora contends the evidence adduced at trial was insufficient to convict him beyond a reasonable doubt. He maintains the New Mexico Supreme Court failed to correctly apply the inquiry required by *Jackson v. Virginia.,* 443 U.S. 307, 324, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). Whether the evidence is insufficient to establish guilt beyond a reasonable doubt is a question of law reviewed de novo. *See Torres v. Mullin,* 317 F.3d 1145, 1151 (10th Cir.) (challenge to the sufficiency of the evidence is properly viewed as a legal question where appellant does not contend the state court's factual findings are erroneous but argues the court's ultimate conclusion – that the evidence is sufficient to support his conviction – constitutes an unreasonable application of *Jackson*), *cert. denied,* 2003 U.S. LEXIS 9341, 124 S. Ct. 562 (2003). Nevertheless, we apply a deferential standard and review only to determine whether the state court's application of *Jackson* was unreasonable. *Id.* at 1156. The decision of the state court will meet the AEDPA test unless the "'analysis [is] so flawed as to undermine confidence that the constitutional claim has been fairly adjudicated.'" *Id.* (quoting *Cruz v. Miller,* 255 F.3d 77, 87 (2d Cir. 2001)).

Mora begins by arguing the New Mexico Supreme Court did not apply the correct standard because it did not specifically cite to *Jackson* and because it failed to include the words "beyond a reasonable doubt" when it determined (1) "a rational jury could have inferred . . . that Mr. Mora was the person who inflicted the injuries," and (2) "a rational jury could have found . . . that Mora committed the crime of criminal sexual contact of a minor under circumstances dangerous to human life." (Appellant's Br. at 19 (quoting *Mora,* 950 P.2d at 797).) Mora's argument is based on a piecemeal reading of the New Mexico Supreme Court's opinion. He ignores the court's recitation of the proper standard and its rigorous analysis of the facts prior to announcing its conclusions. *Mora,* 950 P.2d at 792-800. The New Mexico Supreme Court relied on its own cases adopting *Jackson's* sufficiency of the evidence standard. *Id.* at 797 (citing *State v. Sutphin,* 107 N.M. 126, 753 P.2d 1314, 1319 (N.M. 1988) and *State v. Hernandez,* 115 N.M. 6, 846 P.2d 312, 332 (N.M. 1993)). It explained that, in a case involving circumstantial evidence, "reasonable doubt is not precluded unless circumstantial evidence viewed in the light most favorable to the State gives rise to an equally reasonable inference of innocence." *Mora,* 950 P.2d at 797 (citing *State v. Apodaca,* 118 N.M. 762, 887 P.2d 756, 760 (N.M. 1994)). Whether or not it cited *Jackson,* the New Mexico Supreme Court applied the proper standard – whether a rational trier of fact could find guilt beyond a reasonable doubt. We proceed to examine Mora's individual offenses to determine whether the New Mexico Supreme Court's decision was contrary to or an unreasonable application of *Jackson. See* 28 U.S.C. § 2254(d)(1).

A. Criminal Sexual Contact

Mora argues there was insufficient evidence for a jury to find him guilty beyond a reasonable doubt of criminal sexual contact of a minor. New Mexico law defines "criminal sexual contact of a minor" as "the unlawful and intentional touching of or applying force to the intimate parts of a minor. . . ." N.M. STAT. ANN. § 30-9-13 (1991). It is a third-degree felony when it is perpetrated on a child under thirteen years of age. *Id.*

Although the evidence was circumstantial, it was sufficient to allow a jury to find Mora guilty of this charge beyond a reasonable doubt. The timing of Christina's injuries is a critical consideration. Medical personnel testified they had seen no tear near Christina's anus when she was at the hospital the day before Thanksgiving and Garcia testified she noticed nothing irregular when she changed Christina's diaper the morning of November 24. But when Christina arrived at the emergency room later that day, various physicians testified they saw a tear on Christina's perineum, which eventually led hospital physicians to believe she was sexually abused.

Mora argued the tear could have been the result of Christina's medical care. However, Dr. Ornelas testified it extended from the anal ring muscle to the perineum and could only have been caused by intentional sexual contact. She further testified the injury was inflicted within the prior twenty-four hours and it was unlikely any medical procedures could have caused damage to Christina's genital area.[1] In addition, the nurse who attempted to obtain a urine sample from Christina on November 23 testified she did not tear or scratch Christina's genitalia when she placed and removed the urine collector. Even Dr. James Wilkie, Mora's expert, testified he had never seen such a tear and had never caused a similar tear as a result of performing medical procedures. Given the timing and the nature of the injury, the only persons alone with Christina were Mora and Garcia. The jury was entitled to accept Garcia's version of the facts, and as a result, the evidence points to but one person, Mora. Thus, the state court's conclusion was a reasonable application of law and relevant fact.

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[1] Dr. Ornelas testified she examined Christina on Thanksgiving Day, November 25. Mora argues this discrepancy (Thanksgiving Day was November 24) means Dr. Ornelas examined Christina on November 25. Therefore, since Christina was in the hospital twenty-four hours before Dr. Ornelas' examination, Mora contends her testimony is more consistent with the tear occurring at the hospital. We are not persuaded Dr. Ornelas' mistake as to the date of Thanksgiving negates the jury's finding of guilt.

B. Felony Murder

Under New Mexico law, felony murder requires (1) intent to kill, or (2) knowledge that one's actions create a strong probability of death or great bodily harm, or (3) action that is greatly dangerous to the lives of others. *State v. Griffin,* 116 N.M. 689, 866 P.2d 1156, 1162 (N.M. 1993); *State v. Ortega,* 112 N.M. 554, 817 P.2d 1196, 1208 (N.M. 1991). Additionally, the prosecution must prove the killing occurred during the commission of an independent inherently dangerous felony. *State v. Campos,* 1996 NMSC 43, 122 N.M. 148, 921 P.2d 1266, 1272 (N.M. 1996). Mora argues there was insufficient evidence to establish beyond a reasonable doubt that: (1) he had the requisite intent, (2) the underlying felony is a dangerous felony, or (3) the fatal blow to Christina's head occurred during the commission of the underlying felony.

(1) Intent to Kill

All evidence presented established Christina's head injury was caused by an intentional blow. Dr. Wilkie, testifying for Mora, opined the fatal injury was intentionally inflicted. A neuroradiology expert, Dr. Blaine Hart, compared the x-rays of Christina's healthy skull taken on November 14, 1994,[2] to the x-rays and CAT scan of November 24. He testified that the skull fracture could not have been caused by the child falling or being dropped a few feet; it was caused by either striking the skull with a hard object or hitting the skull against a hard object. Dr. Baldwin, the neurosurgeon who operated on Christina, testified that Christina's fracture implied a shattered skull, which is "a very, very high impact injury." (2d Supp. App., Vol. V at 26.)

Because the blow to Christina's head was intentionally inflicted, the jury could deduce the person who inflicted the blow either intended to kill Christina or acted in a manner greatly dangerous to her life. The question, then, is whether sufficient evidence was presented to allow the jury to conclude Mora inflicted that injury.

The jury heard testimony of various inconsistent statements given by Mora regarding the hours preceding Christina's arrival at the hospital. He told police officers just eight days after Christina suffered the head trauma that Christina was awake and she ate cereal after he got up. Randy Chavez, Garcia's cousin, testified Mora originally told him at the hospital that Christina fell asleep on the couch *while* Garcia was showering so he put her to bed. Mora later told the family that both he and Garcia put Christina to bed when she fell asleep. However, at trial he testified Christina was "asleep" and did not eat from the time he got up to the time the paramedics arrived. (2d Supp. App., Vol. VII at 61.) He also told the jury he talked to his friend, Joseph Sena, for ten minutes while Garcia was showering. In his interview with the police, Sena denied he had a telephone conversation with Mora.[3]

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[2] The November 14 x-rays were taken because of Christina's recent health problems. These x-rays revealed no indication of a skull fracture at that time. Dr. Hart testified Christina's head injury occurred within twenty-four hours of the CAT scan taken on November 24, and the brain swelling would have occurred over minutes or hours, not weeks. Dr. Baldwin testified the bleeding in Christina's head began less than two hours before arrival at the hospital.

Other evidence presented to the jury also contradicted Mora's factual account at trial. He testified he began to prepare an egg for Christina by putting grease in a frying pan and placing the pan on the stove. Photographic evidence of the kitchen taken the day of Christina's fatal injury demonstrated the absence of a frying pan on the stove, in the sink, or elsewhere in the kitchen. Mora also testified Garcia spent time after her shower putting on make-up, but in a photograph taken of her at the hospital she was not wearing make-up. After reviewing the entire record, it is clear the New Mexico Supreme Court did not unreasonably apply the *Jackson* standard to the intent element.

(2) Inherently Dangerous Felony

Mora was convicted of the underlying felony of criminal sexual contact of a minor. A felony murder conviction in New Mexico requires proof beyond a reasonable doubt that the underlying felony was 1) inherently dangerous, or 2) the circumstances surrounding its commission were dangerous to a human life. *See Ortega,* 817 P.2d at 1205. The underlying felony in this case was a third-degree felony and not considered inherently dangerous. *Id.* Therefore, the jury was required to determine whether it was committed in a manner dangerous to human life, considering both the nature of the felony and the circumstances surrounding its commission. *Id.* Mora argues there was insufficient evidence to support the jury's finding that he committed criminal sexual contact of a minor in a manner dangerous to human life.

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[3] Sena was unavailable to testify because he died prior to the trial. The transcript of his interview with the police was read into the record.

Again, our review of the record reveals ample evidence upon which the jury could conclude the criminal sexual contact occurred in circumstances dangerous to Christina's life. Christina was only twenty-three months old and in a weakened condition due to recent illnesses. The jury heard conflicting testimony about the severity of the anal/perineum tear. Dr. Ornelas testified the tear was recently inflicted, was deep, and extended from the anal ring muscle onto the perineum. Mora argues this testimony cannot be used to infer dangerousness to human life because the jury did not find him guilty of sexual penetration and Dr. Ornelas testified the tear could only be caused by penetration. He maintains we must instead look to the testimony of other witnesses who did not find the injury to be as severe. We disagree. While Dr. Ornelas' conclusion regarding the precise *cause* of the tear was clearly not accepted by the jury, it still could find her *description* of the wound to be the most credible. Thus, given Dr. Ornelas' description of the severity of the tear, a rational jury could have concluded beyond a reasonable doubt that the acts resulting in the tear, whether or not penetration occurred, could be dangerous to her life.

In addition, as the New Mexico Supreme Court noted, Mora only had twenty to thirty minutes in which to commit his sexual contact of Christina. Time restraints, coupled with Garcia's relative proximity, could have increased the danger to Christina's life. *Mora,* 950 P.2d at 797. If Christina screamed out in pain when her anal ring and perineum were torn, as Dr. Ornelas testified would have happened, Mora would have had to quiet her quickly. The jury could have relied on these circumstances and made similar inferences in determining the criminal sexual contact of Christina was dangerous to her life. We recognize the evidence in this case supporting Mora's convictions is circumstantial and several inferences from the evidence are required to reach the jury's result. However, the verdict does not require "piling inference on top of inference." *See United States v. Horn,* 946 F.2d 738, 741 (10th Cir. 1991). After careful examination of the record in this case, we conclude the New Mexico Supreme Court did not unreasonably apply *Jackson* in finding sufficient evidence to support this element of Mora's felony murder conviction.

(3) Death Caused During Commission of Criminal Sexual Contact of a Minor

Mora contends there was no evidence demonstrating that his commission of "criminal sexual contact, if it occurred at all, occurred at or near the time of the alleged murder." (Appellant's Br. at 27.) Again, we disagree. There was sufficient evidence allowing a reasonable inference that the crimes were committed within twenty to twenty-five minutes of each other. Dr. Baldwin testified the brain injury occurred between 9:00 a.m. and 11:00 a.m. on November 24. Dr. Ornelas testified the tear on Christina's perineum was also recent. Several witnesses testified neither injury was present the day before Thanksgiving and Garcia saw nothing early that morning. However, both injuries were discovered upon Christina's arrival at the hospital. Thus, the jury could conclude the tear was inflicted sometime between 8 a.m. and 9:30 a.m. Because Mora was alone with Christina for only the twenty to thirty minutes while Garcia was showering, the jury could have concluded, beyond a reasonable doubt, that it was during this time Mora engaged in criminal sexual contact with Christina and it was during this act he inflicted the trauma to her head that resulted in her death. We find no error in the New Mexico Supreme Court's conclusion that the evidence presented at trial was sufficient for a rational jury to find Mora guilty beyond a reasonable doubt of felony murder.

III. Ineffective Assistance of Counsel

Mora also contends the New Mexico Supreme Court and the district court erred in concluding he received effective assistance of counsel at trial. He claims he demonstrated ineffective assistance due to: (1) an actual conflict with his attorney; (2) counsel's failure to recall a hostile witness to impeach Garcia; (3) counsel's failure to object to the prosecutor's use of evidence of Mora's prior felony conviction; (4) counsel's failure to make a timely Confrontation Clause objection to hearsay testimony from a deceased person; and (5) the State's delay in accusing Mora's attorney of suborning perjury.

A habeas petitioner's allegation that his trial counsel provided ineffective assistance is reviewed under the standard identified by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). *See also Romano v. Gibson,* 278 F.3d 1145, 1151 (10th Cir. 2002) (applying *Strickland*). Under *Strickland,* Mora must satisfy a two-part test to prevail. First, he must demonstrate that his attorney's "performance was deficient" and "fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 687-88. In applying this test, we give considerable deference to an attorney's strategic decisions and "recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Second, Mora must demonstrate he was prejudiced by counsel's deficient performance, which requires a showing that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687, 694.

In certain Sixth Amendment contexts, however, prejudice is presumed. *Id.* at 692. "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice," as "are various kinds of state interference with counsel's assistance." *Id.* at 692 (citing *United States v. Cronic,* 466 U.S. 648, 659, n.25, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984)). In addition, *Strickland* identified "one type of actual ineffectiveness claim [that] warrants a similar, though more limited, presumption of prejudice." *Id.* When counsel is burdened by an actual conflict of interest, counsel's duty of loyalty comes into question. *Id.* In that case, "prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." *Id.* (citation omitted). In the end, however, "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. With these standards in mind, we review Mora's claims.

A. Conflict of Interest and Deliberate Interference

In chambers, just before Mora was to testify, the State informed the court and the defense that a police officer inadvertently overheard Leon Taylor, Mora's lead counsel, tell Mora "you're going to have to lie." (2d Supp. App. Vol. VII at 31-32.) The state had this information several days before Mora was to testify but did not immediately bring it to the attention of the court. It decided to accuse counsel of subornation of perjury only if Mora actually took the stand. When the state made its announcement to the court, Taylor vigorously denied the accusation and Mora confirmed he was not told to lie. Nevertheless, the State wanted to call the officer who heard the remark in rebuttal if Mora testified.

After listening to the arguments of counsel, the trial court confirmed the State was not going to use this information in Mora's cross-examination and deferred ruling on the rebuttal witness issue until after Mora testified. On direct examination, Taylor asked Mora if his testimony was the truth and if anyone had told him to lie. On redirect, Taylor again asked Mora if he was telling the truth.

Ultimately, the State did not pursue the issue and run the risk of a mistrial.

In his state habeas petition, Mora raised two claims from these facts. First, he claimed the State's allegation against Taylor created a direct and actual conflict of interest between Mora and Taylor that adversely affected Mora's representation. Second, he claimed the State's timing in disclosing the allegation amounted to prosecutorial misconduct. At the evidentiary hearing on the habeas issues, Mora's counsel reformulated the second claim in opening argument. Citing to *United States v. Cronic,* 466 U.S. 648, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984), he asked the court to "apply the law regarding a presumption of prejudice whenever the state deliberately interferes with a defendant's constitutional right to the effective assistance of counsel." (Appellant's App., Vol. II at 335.) The state court determined there was no actual conflict of interest because it "was in the interests of both Taylor and Mora to show that both were honest." (Appellant's App., Vol. I at 45). Finding no conflict and no ineffective assistance of counsel, the court did not address Mora's claim of prosecutorial misconduct or his alternative claim, deliberate interference with effective assistance of counsel.

(1) Conflict of Interest

Mora contends the criminal allegation against Taylor (suborning perjury) created an actual conflict of interest that adversely affected counsel's representation. "An actual conflict of interest results if counsel was forced to make choices advancing other interests to the detriment of his client. Without a showing of inconsistent interest, any alleged conflict remains hypothetical, and does not constitute ineffective assistance." *United States v. Alvarez,* 137 F.3d 1249, 1252 (10th Cir. 1998) (citations omitted). Even if a defendant shows his lawyer had interests divergent from his own, he must also "establish that the conflict of interest adversely affected his counsel's performance." *Mickens v. Taylor,* 535 U.S. 162, 174, 152 L. Ed. 2d 291, 122 S. Ct. 1237 (2002). "'[U]ntil . . . a defendant shows that his counsel *actively represented* conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.'" *Id.* at 175 (quoting *Cuyler v. Sullivan,* 446 U.S. 335, 350, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980)). *See Moore v. United States,* 950 F.2d 656, 660 (10th Cir. 1991).

Mora suggests counsel's reaction to the prosecution's allegation – his demand to confront the witness and his threat to sue for defamation – demonstrates that his primary interest was no longer Mora's representation but his own interests in avoiding criminal or disciplinary action. Even assuming this argument is sufficient to raise an actual conflict, the record is devoid of any adverse effect on Mora's representation.

Mora cites to two cases that he suggests are applicable to the facts in his case: *Moore v. United States,* 950 F.2d 656 (10th Cir. 1991), and *United States v. Greig,* 967 F.2d 1018 (5th Cir. 1992).[4] Each is distinguishable because,

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[4] He also cites to two Second Circuit cases, *United States v. Cancilla,* 725 F.2d 867 (2d Cir. 1984), and *United States v. Fulton,* 5 F.3d 605 (2d Cir. 1993). The Second Circuit applies a *per se* violation of the Sixth Amendment in two limited circumstances: (1) "where the defendant's counsel was unlicensed" and (2) "when the attorney has engaged in the defendant's crimes." *Fulton,* 5 F.3d at 611. When applied, the *per se* rule eliminates the defendant's need to show that the conflict adversely affected the lawyer's performance as required by

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unlike here, the defendant was able to demonstrate specific instances in the record where his interests were compromised.

For example, in *Moore,* defense counsel was hired and paid by Cox, who was implicated in the same drug conspiracy as the defendant. *Moore,* 950 F.2d at 658. Counsel allegedly told the defendant to plead guilty and falsely implicate someone other than Cox. *Id.* Later, when the lie was discovered, the government charged the defendant with perjury. *Id.* at 657-58. The same counsel told the defendant to plead guilty to the perjury charge. *Id.* at 658. On appeal, we held that the two actual conflicts claimed by the defendant – counsel's alleged personal involvement in suborning perjury at the first plea hearing and his alleged representation of Cox – if true, sufficiently demonstrated counsel's motivation in urging the defendant to plead guilty was to avoid discovery of his own involvement in suborning perjury, the representation of Cox, or both. *Id.* at 658, 660. Because counsel vigorously disputed the allegations, we remanded for an evidentiary hearing regarding the conflict of interest claims. *Id.* at 661.

In *Greig,* the defendant and counsel were accused of meeting, prior to trial, with a co-conspirator who had agreed to be a government witness. *Greig,* 957 F.2d at 1020-21. The meeting did not include the co-conspirator's

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Cuyler. Id. The Second Circuit's *per se* rule has not been adopted by this Court and has been expressly rejected by the Seventh Circuit. *United States v. Wallace,* 276 F.3d 360, 368 (7th Cir.), *cert. denied,* 536 U.S. 924, 153 L. Ed. 2d 781, 122 S. Ct. 2592 (2002). Indeed, one may question the remaining viability of a *per se* rule in light of the Supreme Court's decision in *Mickens, supra.* Nevertheless, even in light of the *per se* rule, both cases specifically found the defendant's representation was adversely affected. *Fulton,* 5 F.3d at 610; *Cancilla,* 725 F.2d at 870.

counsel. *Id.* Because the attorney "was open to an indictment for obstruction of justice based on [the] contacts with [the co-conspirator]," the Fifth Circuit determined there was an actual conflict between the defendant and his counsel. *Id.* at 1022. The court also held an adverse effect was demonstrated when counsel failed to cross-examine the co-conspirator's damaging testimony regarding the meetings. *Id.* at 1024-25. In addition, prior to the defendant's sentencing, the court held a disciplinary hearing on the attorney's conduct where, through the defendant's testimony, the attorney attempted to place the blame on his client in order to exonerate himself. *Id.* at 1026.

In contrast to these cases, the record here contains no suggestion of an adverse effect on Mora's representation. Unlike the defendant in *Moore,* Mora told the court Taylor did *not* attempt to suborn perjury. In fact, at the evidentiary hearing on Mora's habeas petition, Taylor's co-counsel, Cliff McIntyre, testified he and Taylor were not affected by the accusation but believed it was just a "self-serving way of *[sic]* the state to prosecute this defendant." (Appellant's App. Vol. II at 456-57.) Moreover, unlike the facts in *Greig,* the alleged conflict had no bearing on the testimony at trial. It did not prevent Taylor from calling Mora to testify on his own behalf and he fails to proffer any testimony that would have been elicited but for the State's allegation.

Instead, Mora argues his interests were adversely affected when counsel asked him whether he was telling the truth and whether anyone instructed him to lie. He contends counsel did so in spite of the possibility it might cause jurors to question his honesty. This argument is singularly unpersuasive. Attorneys often ask their clients whether they are telling the truth. Mora's trial lasted more than a week with a trial transcript spanning eight volumes, comprising over 1,400 pages. We cannot find Mora's interests were compromised by three routine questions which allowed Mora to tell the jury he was truthful. Accordingly, the New Mexico Supreme Court's ruling is neither contrary to clearly established federal law, nor is it an unreasonable application of the law to the facts of this case.

(2) Deliberate Interference

Based on the State's delay in notifying defense counsel of its subordination of perjury allegations, Mora claims the prosecution "deliberately interfered with [his] constitutional right to the effective assistance of counsel." (Appellant's Br. at 48.) Because we find no ineffective assistance stemming from the allegations against Mora's counsel or the resulting representation, we find no merit to this claim. Accordingly, Mora's various other contentions regarding this issue are also rejected.[5]

B. Failure to Recall Witness

Mora claims he was denied effective assistance of counsel because Taylor did not recall a State witness, Virginia Saavedra (Christina's grandmother), after discovering the State had mistakenly failed to disclose a taped interview with her. [App't Br. at 38] Review of Saavedra's interview revealed her account of the telephone conversation she had with Garcia the morning of Christina's injury. She stated Garcia told her Christina went to sleep "in the middle of watching the parade. And then [Garcia] went to get in the shower." (Appellant's App., Vol. I at 318.) Mora contends this testimony would have substantially supported his version of the facts and directly contradicted Garcia's testimony that Christina was fine and awake when she left the baby with Mora. He maintains "a reasonable probability exists that if the jury had received this potent impeachment evidence, the result of the trial would have been different." (Appellant's Br. at 39.) The state court disagreed and concluded the decision not to recall Saavedra, a hostile witness, was a reasonable tactical decision.[6]

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[5] Mora claims an actual conflict of interest obligated the trial court to conduct an inquiry and he should have been given the opportunity to consult with new counsel concerning the suborging [sic] perjury accusation. However, the trial court's "failure to make the *[Cuyler v.] Sullivan*-mandated inquiry does not reduce the petitioner's burden of proof. . . ." *Mickens,* 535 U.S. at 173-74. Because Mora failed to prove a conflict of interest that prejudiced his defense, this issue is rejected.

At trial, after the testimony of Saavedra and Henry Campos (Garcia's step-father), the State discovered it failed to provide copies of two taped pre-trial interviews, one of Campos and the other of Saavedra. Mora's attorneys immediately moved for a mistrial due to the prejudice to Mora's ability to cross-examine the witnesses. The court withheld ruling and the tapes were provided to the defense for review over the weekend. The next day of trial, the court denied the motion for a mistrial but invited Mora's attorneys to recall Saavedra or any other witnesses for recross examination. Defense counsel declined.

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[6] The federal magistrate's report and recommendation took a different tack, concluding the statements were double hearsay and thus not allowable as impeachment evidence. Mora contests this interpretation of New Mexico's evidentiary rules. We need not reach the issue as we find the failure to recall Saavedra was a reasonable trial strategy.

At the state habeas evidentiary hearing, McIntyre, an inexperienced attorney at the time of the trial who assisted the more experienced Taylor, testified regarding defense counsels' strategy. He stated one reason they decided to forego recalling Saavedra was Taylor's belief the trial court committed reversible error when it denied a mistrial based on the State's failure to timely provide the tapes. He testified it was his impression that Taylor did not want to cross-examine Saavedra again because it could jeopardize the mistrial claim on appeal. McIntyre also stated he and Taylor determined Saavedra's position as a hostile witness and her possible rehabilitation by the government after their impeachment would outweigh any benefit from recalling her as a witness.

In determining whether counsels' strategy in this case was "objectively reasonable,"

> We are bound to heed the Supreme Court's pointed warning in *Strickland v. Washington* . . . against using hindsight to second-guess attorneys' tactical decisions. *Strickland* requires us to impose a heavy presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, . . . the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . Thus, under *Strickland,* we must uphold counsel's performance so long as the challenged action *might* be considered *sound* trial strategy. . . .

United States v. Aptt, 354 F.3d 1269, 1284 (10th Cir. 2004) (internal citations and quotations omitted).

Mora argues defense counsel based their strategy on a misunderstanding of the law – that the mistrial issue would be waived if Saavedra was called back to the stand. He asserts, "when the state court then reasoned that, according to *Strickland,* this 'tactic,' conceived from counsel's own imagination of what the law was rather than any foundation in reality, somehow fell within the range of what a competent lawyer does, the court's position became diametrically opposed to *Strickland.*" (Appellant's Br. at 41.)

"The purpose of ineffectiveness review is not to grade counsel's performance." *Chandler v. United States,* 218 F.3d 1305, 1313 (11th Cir. 2000). "To state the obvious: the trial lawyers, in every case, could have done something more or something different." *Id.* More than a simple mistake of law is needed. *See Bullock v. Carver,* 297 F.3d 1036, 1048 (10th Cir.) ("an attorney's unawareness of relevant law at the time he made the challenged decision does not, in and of itself, render the attorney's performance constitutionally deficient"), *cert. denied,* 537 U.S. 1093, 154 L. Ed. 2d 640, 123 S. Ct. 703 (2002); *Hawkins v. Hannigan,* 185 F.3d 1146, 1154-55 (10th Cir. 1999) (even assuming counsel was mistaken as to the scope of the stipulation, the decision to enter the stipulation was a reasonable trial decision).

Even if Taylor made a legal mistake in assessing the advantages and disadvantages of recalling Saavedra, the decision was based on sound reasons as well. Saavedra was a sympathetic witness, a grieving grandmother openly hostile to Mora, the man she believed killed her granddaughter. Although the taped interview may have affected Garcia's credibility, this advantage was tempered by the State's opportunity to allow Saavedra to explain the discrepancy and at the same time give her a second chance to tell her side of the story.

Mora contends the reasons for failing to recall Saavedra are not viable in light of the critical importance of the credibility issues. However, her statement had only limited potential for boosting Mora's credibility since it did not fully support even one of Mora's alternative versions of the facts. In his statement to the police, also admitted into evidence, Mora stated Christina was awake from the time he got up until Garcia went to take her shower. At trial, he testified he did not watch the parade and that Christina was asleep from the time he got up. Neither of these versions are fully supported by Saavedra's interview statements. Thus, the state court's determination that defense counsel made a tactical decision in this instance is not an unreasonable application of *Strickland.*

C. Failure to Object to Improper Use of Prior Felony Conviction

At trial, and over defense counsel's objection, the court allowed the State to cross-examine Mora regarding his guilty plea to a felony charge of possession of a stolen weapon the summer before Christina's death. Defense counsel attempted to mitigate the State's characterization of the felony by allowing Mora to explain, on redirect, the circumstances surrounding his arrest for the charge. Mora testified he and Garcia were "making out" in the car and he was arrested when an officer found a weapon underneath the seat. On re-cross, the government established the type of weapon, an Uzi Tec-9, and that Mora knew the gun was stolen.

In closing argument, defense counsel argued the felony was only a minor run-in with the law and Mora was a hardworking boy. In response, the state argued Mora was not a mild-mannered young man – he was "found with [] a Tec-9 machine-gun." (2d Supp. App. Vol. VIII at 81.) The New Mexico Supreme Court held the prosecutor's closing remarks were not improper because "the State did not use this conviction as substantive evidence of [Mora's] guilt." *Mora,* 950 P.2d at 804. The state habeas court ruled counsel was not ineffective in failing to object because he had previously opened the door. Mora contends the state court erred in "[c]oncluding . . . that counsel was not ineffective when he failed to object to the impermissible closing argument *because* he had previously been ineffective in opening the door." (Appellant's Br. at 44.) He argues this conclusion is an objectively unreasonable application of *Strickland.*

Once defense counsel's objections to admission of the conviction were overruled, it was reasonable to try to humanize the felony by eliciting testimony about the surrounding facts. In closing argument, defense counsel again attempted to characterize these negative facts in the light most favorable to Mora. Thus, opening the door was a reasonable trial strategy. The prosecutor's rebuttal was also a fair response to the spin given by defense counsel. Thus, the failure to object to the State's remarks was not ineffective assistance of counsel. The state courts reasonably applied *Strickland* in reaching the same conclusion.

D. Confrontation Clause Objection

In Mora's pre-trial statement to the police he said he talked with his friend, Joseph Sena, for about ten minutes on the morning of November 24 while Garcia was showering. In an interview with police, Sena denied talking with Mora that day. Sena died before trial. As a result, the State gave pre-trial notice it intended to introduce Sena's statement under the catch-all exception to the hearsay rule, N.M. R. EVID. 11-804(B)(5). Mora's attorneys objected based on hearsay and prejudice, but raised no Confrontation Clause objection. The trial court overruled the objections and a police officer read the transcript of Sena's interview at trial. After the evidence had been admitted, defense counsel moved for a mistrial based, in part, on a Confrontation Clause violation. Mora now claims the New Mexico Supreme Court erred on direct appeal when it ruled the statement was admissible. He also claims the state habeas court misapplied *Strickland* in ruling the failure to assert a Confrontation Clause objection prior to the jury hearing Sena's statement was not ineffective assistance of counsel.

We need not review the New Mexico Supreme Court's evidentiary ruling because, even if the trial court erred in admitting the evidence and professional norms required Mora's attorneys to raise a constitutional objection, Mora failed to establish he was prejudiced by counsel's omission. As the Supreme Court has stated, "there is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland,* 466 U.S. at 697.

Even when we regard the unaffected findings as a given and consider the effect of the assumed errors on the remaining findings, Mora has not established the jury's decision "would reasonably likely have been different absent the errors." *Id.* at 696. Sena's statement was not the only evidence calling Mora's veracity into question. Randy Chavez, Garcia's cousin, testified to Mora's statements while the family was in the hospital waiting room on November 24. When the doctors told the family Christina had massive bleeding, the family asked if Christina's head injury could be due to a recent fall in the parking lot. When the doctor said no, Mora "stated voluntarily all of a sudden that Christina had fallen out of bed" recently and Mora had not told Garcia prior to that moment. (2d Supp. App., Vol. IV at 79-80, 87.) He stated Mora also gave "two different stories [regarding] what time and who was present when he put [Christina] to bed" that morning. (*Id.* at 88.) At one point Mora said Christina was fine when she fell asleep on the couch and that he put her to bed himself. At another time, Mora said Christina was falling asleep and he picked her up at about the time Garcia finished her shower so he and Garcia put Christina to bed together. As discussed above, Mora's own statements to police conflicted with his testimony at trial. Add to this the medical testimony regarding the nature and timing of Christina's injuries and there is little doubt the jury's conclusion would have been the same even had Sena's statement been held inadmissible based on his counsel's objection. *See Hawkins,* 185 F.3d at 1161 (no prejudice established given expert testimony, medical testimony and defendant's own conflicting statements). Again, the state courts did not unreasonably apply *Strickland* to this claim.[7]

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[7] In his reply brief, Mora raises a cumulative error issue. We do not ordinarily review issues raised for the first time in a reply brief. *Stump v. Gates,* 211 F.3d 527, 533 (10th Cir. 2000). Moreover, the absence of a

(Continued on following page)

CONCLUSION

In sum, the state courts correctly determined the evidence sufficient to sustain Mora's convictions and he received effective assistance of counsel at trial. The state courts' conclusions were not unreasonable applications of clearly established federal law and were based on reasonable determination of the facts. AFFIRMED.

Entered by the Court:

Terrence L. O'Brien

United States Circuit Judge

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finding of any error renders a cumulative error analysis inapplicable. *United States v. Rivera,* 900 F.2d 1462, 1470 (10th Cir. 1990).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CHRISTOPHER MORA,

Petitioner,

vs. No. CIV 01-748 JP/RLP

JOE WILLIAMS, Warden,

Respondent.

ORDER

(Filed July 25, 2002)

On May 28, 2002, the United States Magistrate Judge filed Magistrate Judge's Proposed Findings and Recommended Disposition (Doc. No. 25) to which Petitioner filed timely Objections (Doc. No. 26) on June 10, 2002. This Court has considered the entire record and has made a *de novo* review and determination regarding those parts of the Magistrate Judge's Proposed Findings and Recommended Disposition to which Plaintiff objected. The Court finds that the Magistrate Judge's Proposed Findings should be adopted with the following modifications to the Proposed Findings:

1. The description of the injury to Christina's perineum as "a one-half tear" should also be considered what doctors variously called a "scratch" and a "cut" and which the autopsy report identified as a "laceration" measuring 0.3 inches long and 0.1 inches deep.
2. In regard to the proposed finding set forth in Paragraph 18, the Court clarifies that witness Sena did not testify in person, but his statements were reported by a testifying police officer.

3. In regard to Paragraph 20 of the Proposed Findings, the Court notes that doctors testified that Christina's muscle tone exaggerated the appearance of the injury, that the Petitioner's conviction was of criminal sexual contact, the specific nature of which was not described as "anal rape," and that the phrase "most likely the floor" should not be adopted as a part of the findings because it is unclear precisely how Christina's skull was fractured.

4. In regard to the Proposed Finding in paragraph 28 that "Ms. Garcia cannot be impeached by this testimony [Ms. Saavedra's previous recorded statement to the police officer] because it is double hearsay" the Court notes that the weight of the circumstantial evidence was sufficient to prove the guilt of the Petitioner independent of this statement.

5. In regard to the Proposed Finding in paragraph 29, the Court clarifies that Detective Ortiz not only read her notes from her conversation with Joseph Sena, but she also testified at trial about Mr. Sena's statement which was recorded in the officer's notes, not by tape recorder.

After making these modifications to the Magistrate Judge's Proposed Findings, the Court determines that it should adopt the United States Magistrate Judge's Recommended Disposition.

IT IS THEREFORE ORDERED THAT:

1. The Court adopts the Magistrate Judge's Proposed Findings (as modified above) and Recommended Disposition; and

2. Petitioner's claims will be dismissed with prejudice by a separate Final Judgment.

/s/ James A. Parker
CHIEF UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CHRISTOPHER MORA,

Petitioner,

vs. No. CIV 01-748 JP/RLP

JOE WILLIAMS, Warden,

Respondent.

RULE 58 FINAL JUDGMENT

(Filed July 25, 2002)

Contemporaneously with the entry of this final judgment, the Court entered an Order adopting the United States Magistrate Judge's Proposed Findings (with modifications) and Recommended Disposition.

THEREFORE, judgment is entered in favor of the Respondent and against the Petitioner, Christopher Mora, whose petition is dismissed with prejudice.

/s/ James A. Parker
CHIEF UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CHRISTOPHER MORA,
Petitioner,
v. Civ. No. 01-748 JP/RLP
JOE WILLIAMS, Warden,
Respondent.

MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION[1]

(Filed May 28, 2002)

1. This is a proceeding for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Mr. Mora is currently serving a life sentence, a jury having found him guilty of First Degree Murder (Felony Murder), with the underlying offense being Criminal Sexual Contact, and of Criminal Sexual Contact in the Third Degree (Child Under 13). *See* Answer, Exhibit I thereto (Amended Judgment, Sentence and Commitment).

2. Mr. Mora filed a direct appeal of his conviction, which resulted in the New Mexico Supreme Court (NMSC)

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[1] Within ten (10) days after a party is served with a copy of the Magistrate Judge's Proposed Findings and Recommended Disposition (the "Proposed Findings") that party may, pursuant to 28 U.S.C. § 636(b)(1), file in the United States District Court written objections to the Proposed Findings. A party must file any objections within the ten-day period allowed if that party wants to have appellate review of the Proposed Findings. If no objections are filed, no appellate review will be allowed.

opinion in *State v. Mora*, 950 P.2d 789 (N.M. 1997).[2] The verdict on the above two charges was affirmed. Mr. Mora filed a petition for writ of habeas corpus in state court on January 27, 1999. Exhibit J to Answer. After a full evidentiary hearing on the merits, the state court entered its Findings of Fact and Conclusions of Law on April 28, 2000. Exhibit P. Relief was denied. The state court issued its Order denying the writ on May 12, 2000. Exhibit Q. Mr. Mora filed a petition for writ of certiorari on June 12, 2000, which was granted on August 8, 2000. Exhibits R & U. After briefing and oral arguments, the NMSC quashed the grant of certiorari on May 7, 2001. Exhibits FF & GG. The petition in this case was timely filed on June 28, 2001. The state concedes exhaustion. Answer, ¶ 3.

3. Mr. Mora's petition in this court was filed by retained counsel, who also filed a Memorandum Brief in Support of the petition [Doc. 2]. Respondent, having been granted an extension of time to file its Answer, also filed a Motion to Dismiss on August 29, 2001 [Doc. 11]. That Motion was devoid of grounds for relief and Mr. Mora's request to expand the record was granted and ruling on that motion was deferred until the case had been fully briefed. [Doc. 14]. Briefing was completed on December 3, 2001.

4. Christopher Mora lived with his girlfriend, Andrea Garcia, and her 23-month-old daughter, Christina Sierra. Mr. Mora and Ms. Garcia had been dating since 1993 and moved in together in September, 1994. Ms. Garcia's mother, Virginia Saavedra, lived with them until the end

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[2] That opinion vacated his conviction for intentional child abuse resulting in death on the ground of double jeopardy.

of October, 1994. The events giving rise to Mr. Mora's arrest occurred on Thanksgiving day, November 24, 1994. *Mora,* 950 P.2d at 793.

5. According to Ms. Garcia, she and Mr. Mora arose in the morning and she went to Christina. The three of them then watched the Macy's Thanksgiving Day Parade on television until Ms. Garcia decided to take a shower, leaving Mr. Mora in charge of Christina. She testified she took a lengthy, 25 to 35-minute shower and when she emerged from the bathroom saw Mr. Mora carrying Christina back to bed. He told her that Christina had fallen asleep. *Id.*

6. According to Mr. Mora's trial testimony, he and Ms. Garcia were having sex when Christina began crying from her bedroom. Mr. Mora said he insisted that Ms. Garcia tend to Christina and she slammed the bedroom door as she went to Christina. Mr. Mora said that Ms. Garcia took Christina into the living room and that Christina was crying or screaming and then she suddenly stopped. When he came into the living room about 20 minutes later, Christina appeared to be asleep and it was at this point that Ms. Garcia went to take a shower. Mr. Mora testified that he put Christina to bed and then went into another room to take a phone call from his friend, Joseph Sena. *Id.*

7. Once Ms. Garcia and Mr. Mora realized that Christina was unconscious and not breathing, they called 911 and paramedics took her to the hospital, where she was treated by several medical personnel. The trial testimony differed as to cause and date of occurrence, but it is undisputed that Christina had a one inch tear near her anus, the perineum. One physician testified that in her

opinion, Christina had been anally raped within 24 hours of the physician's examination. The defense expert testified that the tear was approximately one week old and that the autopsy contained no evidence of any vaginal bleeding and bruising and there was no evidence of sexual abuse. *Id.* at 794. Christina died the day after Thanksgiving. The cause of death was blunt trauma to the head. *Id.*

8. Mr. Mora asserts the following grounds for relief: (i) insufficiency of the evidence for both the felony murder and the criminal sexual contact convictions; and (ii) ineffective assistance of counsel based on (a) conflict of interest; (b) failure to recall a witness; and (c) failure to make pertinent objections at trial.

9. Mr. Mora filed his habeas petition after the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), and his case is therefore governed by its provisions. Because Mr. Mora's claims have all been adjudicated on their merits by the state court, he is entitled to relief only if he can establish that

> the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law; decided the case differently than the Supreme Court has on a set of materially indistinguishable facts; or unreasonably applied the governing legal principle to the facts of the prisoner's case.

McCracken v. Gibson, 268 F.3d 970, 975 (10th Cir. 2001) (citing *Williams v. Taylor,* 529 U.S. 362, 412-413 (2002)).

"The reasonableness of the state court's application of federal law is to be evaluated by an objective standard." *Mitchell v. Gibson,* 262 F.3d 1036, 1045 (2001) (citing

Williams, 529 U.S. at 413). "Unreasonable," as defined by the Court, is different from an incorrect or erroneous application. *Id.* (citing *id.* at 412). Factual findings are presumed correct unless rebutted by clear and convincing evidence. § 2254(e)(1).

10. *Insufficiency of the evidence*. Mr. Mora argues that the NMSC unreasonably applied *Jackson v. Virginia,* 443 U.S. 307 (1979) to the facts of his case when the state court found that the prosecution had proved all of the essential elements of felony murder. The *Jackson* inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319 (emphasis in the original). This standard "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id.* at 324 n.16.

11. In New Mexico, felony murder is defined as:

> Murder in the first degree is the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused:
>
> . . .
>
> in the commission of or attempt to commit any felony . . .

NMSA (1978) § 30-2-1(A)(2).

12. The crime of criminal sexual contact of a minor is a third-degree felony. *See* NMSA (1978) § 30-9-13. That crime is defined as "the unlawful and intentional touching or applying force to the intimate parts of a minor." *Id.*

"Intimate parts" includes the genital area and the anus. *Id.*

13. The NMSC has imposed a *mens rea* requirement for felony murder.

> "Under the [felony murder statute], proof that a killing occurred during the commission or attempted commission of a felony will no longer suffice to establish murder in the first degree. In addition to proof that the defendant *caused* . . . the killing, there must be proof that the defendant *intended* to kill (or was knowingly heedless that death might result from his conduct). An unintentional or accidental killing will not suffice. . . . " We reaffirmed this holding in *State v. Griffin,* 866 P.2d 1156, 1162 (1993), in which we held, "The felony murder [mens rea] requirement is satisfied if there is proof that the defendant intended to kill, knew that his actions created a strong probability of death or great bodily harm . . . , or acted in a manner greatly dangerous to the lives of others."

State v. Lopez, 920 P.2d 1017, 1019 (N.M. 1996) (quoting *State v. Ortega,* 817 P.2d 1196, 1205 (1991) and *State v. Griffin*) (parallel citations omitted, emphasis by the court).

14. "[T]he purpose of the felony-murder rule in New Mexico is to elevate second-degree murder to first-degree murder 'when it occurs in circumstances that the legislature has determined are so serious as to merit increased punishment.' . . . [T]hese serious circumstances include the commission of a first-degree felony or a lesser-degree felony that is itself inherently dangerous or is committed under circumstances that are inherently dangerous." *State*

v. Campos, 921 P.2d 1266, 1272 (N.M. 1996) (citations omitted).

15. Mr. Mora contends that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that he intended to kill Christina. He argues that the evidence about Christina's injuries was conflicting and there was no direct testimony as what caused Christina's head injury: "The facts established only that Mora was alone with Christina during part of the time when the injury leading to her death could have occurred, Garcia was alone with Christina during part of that time, and the injury was extensive." Memorandum in Support of Christopher Mora's Petition for Writ of Habeas Corpus ("Memorandum") [Doc. 2] at 17. Mr. Mora states that with no evidence of how Christina was killed or who committed the act, the jury was left to speculate as to the perpetrator, the cause of the injury, and the state of mind required for a conviction. *Id.* Thus, he concludes, the NMSC's opinion that the extent of Christina's injuries alone established the necessary *mens rea* was an unreasonable application of *Jackson v. Virginia. Id.*

16. The undisputed facts show that both Mr. Mora and Ms. Garcia were alone with Christina on Thanksgiving morning and that her head injuries were severe. The adults gave conflicting versions of the events of the morning leading to the 911 call, and each one's testimony tended to implicate the other. An X-ray of Christina's head taken on November 14, 1994 showed no skull fractures. A CAT scan, her surgery, and the autopsy showed severe soft-tissue injuries, a skull fracture, and "blood clots consistent with previous episodes of trauma." *Mora,* 950 P.2d at 794. One physician testified that the injuries occurred within 24 hours of the November 24th X-ray and

another physician estimated the injuries occurred within two hours of her Thanksgiving morning surgery.

17. Similarly, there was conflicting testimony about the timing of the tear above Christina's perineum. One physician testified Christina had been anally raped within 24 hours of her examination; Mr. Mora's expert testified the tear was a week old and there was no evidence of sexual abuse.

18. Mr. Mora gave conflicting accounts of the events of Thanksgiving morning, accounts that differed from his trial testimony summarized at ¶ 6, *supra*. He had told police investigators that when he awoke Thanksgiving morning he made Christina's cereal, which she had eaten. He had told Randy Chavez, Ms. Garcia's cousin, that Christina had fallen asleep on the couch while Ms. Garcia was taking a shower and that he had picked her up and when Ms. Garcia had finished her shower, the two of them put Christina to bed. Mr. Mora also claimed that while Ms. Garcia was in the shower, he was talking on the telephone to his friend, Joseph Sena; Mr. Sena denied having spoken with Mr. Mora on Thanksgiving morning.

19. All of the foregoing factual disputes were resolved by the jury against Mr. Mora. Either Mr. Mora or Andrea Garcia killed Christina on Thanksgiving morning, given the severity of her head injury and the undisputed medical testimony that she would have been unconscious or extremely lethargic shortly thereafter. In such close circumstances, the changes in Mr. Mora's accounts of the morning and his rebutted claim that he spoke to a friend that day would lead most jurors to weigh the facts against him. With regard to the sexual contact, the testimony was

conflicting and the jury also resolved that issue against Mr. Mora.

20. Based on the autopsy photo, admitted into evidence, there is a substantial wound above Christina's anus. Whether that injury occurred as a result of anal rape or by prodding with a hard object, either action constitutes criminal sexual contact of a minor. Felony murder requires an intent to kill; knowledge that death or great bodily harm is probable; or conduct greatly dangerous to the lives of others. The medical testimony indicated Christina's head was slammed against a hard object, most likely the floor. Any of the foregoing criteria are met with that conduct. Having read the entire trial transcript, the court finds that the NMSC did not unreasonably apply *Jackson v. Virginia* to the facts of this case. Mr. Mora's arguments in reality do not test the sufficiency of the evidence; instead, he is asking this court to find his version of events more credible than Andrea's. This the court cannot do. *Jackson,* 443 U.S. at 318-19.

21. *Ineffective assistance of counsel.* Mr. Mora's first claim of ineffective assistance of counsel is counsel's failure to advise his client of a conflict of interest. When Mr. Mora's counsel indicated that the defendant would take the stand to testify, the prosecution advised the court (in a conference in chambers) that a police officer had overheard counsel telling his client that he'd have to take the stand and lie. The prosecutor said that if Mr. Mora testified, the officer might testify in rebuttal. Counsel denied the charges and asked Mr. Mora, "Did I ever ask you to lie?" Mr. Mora said no. When Mr. Mora took the stand, counsel asked him if anyone asked him to lie. Mr. Mora said no. *See* Trial Transcript Volume dated January 30, 1996, at 30 *et seq.* When Mr. Mora took the stand the

prosecutor did not allude to the incident in chambers nor did he call the police officer as a rebuttal witness.

22. Mr. Mora contends that he and his counsel had a conflict of interest because counsel was trying to protect himself from criminal prosecution for suborning perjury and at a minimum should have advised his client to retain counsel until the matter was resolved.

23. When a conflict of interest is claimed, the defendant must demonstrate an actual conflict which adversely affected his lawyer's performance. *United States v. Alvarez,* 137 F.3d 1249, 1251 (10th Cir. 1998). If such a showing is made, prejudice is presumed. *Id.* In the trial court's Findings of Fact and Conclusions of Law, entered after the habeas hearing. Record Proper, Vol. 2 of 2, RPO433 ("Findings & Conclusions"), the court found: "No actual conflict of interest existed between trial counsel and Mora. It was in the interest of both [counsel] and Mora to show that both were honest." *Id.* at ¶ 58.

24. I agree with the trial court that there was no conflict of interest that adversely affected counsel's representation. "An actual conflict of interest results if counsel was forced to make choices advancing other interests to the detriment of his client." *Alvarez,* 137 F.3d at 1252. Thus, the defendant "must be able to point to specific instances in the record which suggest an impairment or compromise of his interests. . . . " *Id.* The record is devoid of such impairment or compromise. *See* Trial Transcript dated January 30, 1996 at 30-37 & 71.

25. Mr. Mora's second ground for ineffective assistance is counsel's failure to recall Virginia Saavedra to the stand. During the trial defense counsel became aware that Henry Campos and Virginia Saavedra, Andrea Garcia's

mother and stepfather, had been interviewed more than once and that the prosecution had tapes which had not been turned over to the defense. Ms. Saavedra had already testified and the trial court told counsel they could recall her to the stand. At trial, Ms. Saavedra had testified that Andrea told her that Christina had fallen asleep while Andrea was in the shower. In the statement to police she said that Andrea told her that Christina had fallen asleep before Andrea went into the shower. *See* Interview of Virginia Saavedra dated April 25, 1995 at 38.

26. At the habeas hearing, defense counsel told the court that a tactical decision was made not to recall Ms. Saavedra because counsel believed that if the judge denied the defense motion for a mistrial (which the court did deny), then that failure would be reversible error. *See* Transcript of Proceedings ("Habeas Transcript"), dated October 28, 1999 at 107. Counsel also stated that Ms. Saavedra was a hostile witness and there was some concern that the state could rehabilitate her. *Id.* at 108.

27. In his Findings & Conclusions, the trial judge merely stated that counsel's decision not to recall Ms. Saavedra "was a strategic decision not to cross-examine a hostile witness any further. . . . " *See* Findings & Conclusions, ¶ 61. The court found that because it was a strategic decision, the court would not second-guess counsel's strategy. *Id.*

28. In this federal proceeding, Mr. Mora argues that Ms. Saavedra's statement that Christina fell asleep while watching the parade would support Mr. Mora's version of events and tend to implicate Andrea. This supposition is based on the medical testimony that immediately after Christina's skull was fractured she would have been

lethargic or unconscious. Thus, if she fell asleep while watching television, the jury would be able to infer that Andrea had dealt the fatal blow just as Mr. Mora had testified. Because of the importance of this testimony, Mr. Mora argues that counsel was ineffective for failing to recall Virginia Saavedra to the stand to impeach Andrea Garcia's testimony. Unfortunately, Ms. Garcia cannot be impeached by this testimony because it is double hearsay. Ms. Garcia was not a party and what she purportedly told Ms. Saavedra is hearsay and what Ms. Saavedra told the police that Ms. Garcia said to her is also hearsay. *See* N.M.Evid.R. 11-803. Thus, counsel was not ineffective for not recalling Ms. Saavedra to the stand.[3]

29. Next, Mr. Mora argues that counsel was ineffective for failing to object on Confrontation Clause grounds to the reading of Joseph Sena's statement to the jury. Mr. Mora had told police, and testified at trial, that while Andrea was in the shower he was talking to his friend, Joseph Sena, on the telephone. When the police interviewed Mr. Sena, he acknowledged his long friendship with Mr. Mora but denied having spoken with Mr. Mora until after 5:00 p.m. on Thanksgiving. Mr. Sena died before trial and the transcript of his taped interview was read into the record by Detective Ortiz. *See* Trial Transcript dated January 26, 1996 at 101. Counsel objected on the ground that the statement was hearsay but failed to raise a constitutional challenge.

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[3] Even if counsel had somehow been able to get this testimony in, the facts of the case would render it irrelevant as to timing, *see* ¶ 31, *infra*.

30. To prevail on a claim of ineffective assistance of counsel, Mr. Mora must prove both that counsel's performance fell below a reasonable standard of professionalism and that but for counsel's errors the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Assuming that failing to object to this testimony violates the Confrontation Clause, Mr. Mora cannot show that the result would have been different.

31. In all of Mr. Mora's various versions of what occurred Thanksgiving morning, none indicated that from the time he arose until 911 was called that Christina was unconscious. He told police he had made cereal for Christina, which she had eaten. At trial he testified the three of them watched television together and Christina was fussy and did not want to go into the shower with Andrea. The medical testimony indicated that Christina could not have eaten, talked or walked after suffering the severe fracture to her skull. *See, e.g.*, Trial Transcript dated January 26, 1996 at 28, 94. Thus, the overwhelming inference to be drawn from this testimony, whichever version is believed, is that the injuries suffered by Christina occurred while Andrea was in the shower. Thus, even if the Sena testimony had not been admitted it is more likely than not that Mr. Mora would have been found guilty.

32. Finally, Mr. Mora argues that counsel was ineffective for failing to object to the prosecutor's use of a prior conviction as substantive evidence in the state's closing argument. In *State v. Mora*, 950 P.2d 789 (N.M. 1997), the court determined that the state did not use the conviction as substantive evidence of Mr. Mora's guilt. *Id.* at 804. Instead, the court found that the reference to the stolen gun was mere rebuttal to defense counsel's closing

which explained the circumstances surrounding the gun. *Id.*

33. At the state habeas hearing, where this claim was raised as an ineffective assistance of counsel claim, the trial court essentially held the same: because defense counsel opened the door, there were no grounds to object. Habeas Transcript, ¶ 62.

34. In essence, Mr. Mora is arguing that defense counsel was ineffective for commenting on the circumstances of the prior conviction and allowing the "door to be opened." Counsel had objected to the introduction of this evidence at trial and was overruled. Having lost that battle, counsel made a decision to undermine its perceived impact by having Mr. Mora testify to the circumstances of the event. In closing, he argued that the conviction was *de minimus* and that Mr. Mora was a hardworking boy. The prosecutor said that having a gun did not make Mr. Mora as mild-mannered as the defense made him out to be.

35. All of defense counsel's decisions in this regard were strategic decisions and cannot be the ground for an ineffectiveness claim. *Strickland.* The fact that his strategy did not turn out as expected does not make him ineffective.

RECOMMENDED DISPOSITION

I recommend that Respondents' Motion to Dismiss [Doc. 11] be denied. I recommend that the Petition for Writ of Habeas Corpus be denied and this case dismissed with prejudice.

/s/ Richard L. Puglisi
Richard L. Puglisi
United States Magistrate Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

May 7, 2001

NO. 26, 385

CHRISTOPHER MORA,

Petitioner,

vs.

RONALD L. LYTLE, Warden,

Respondent.

ORDER

WHEREAS, this matter came on for consideration upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised, issued its writ of certiorari on August 8, 2000, and, after further consideration of the pleadings, briefs, and oral argument, the judgment of the Court is that the writ shall be quashed, Chief Justice Patricio M. Serna, Justice Joseph F. Baca, Justice Gene E. Franchini, Justice Pamela B. Minzner, and Justice Petra Jimenez Maes concurring;

NOW, THEREFORE, IT IS ORDERED that the writ of certiorari issued on August 8, 2000, hereby is QUASHED.

IT IS SO ORDERED.

WITNESS, the Hon. Patricio M. Serna, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 7th day of May, 2001.

/s/ Kathleen Jo Gibson

(SEAL)

Kathleen Jo Gibson, Chief Clerk
of the Supreme Court of the
State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

August 14, 2000

NO. 26,385

CHRISTOPHER MORA,

Petitioner,

vs.

RONALD L. LYTLE, Warden,

Respondent.

ORDER

WHEREAS, this matter came on for consideration by the Court upon a petition for writ of certiorari to the District Court for the County of Bernalillo, and the Court having considered said petition and being sufficiently advised issued its writ of certiorari on August 8, 2000;

WHEREAS, the petition was GRANTED on issue numbered one (1) regarding conflict of interest as presented in the petition.

NOW, THEREFORE, IT IS ORDERED that petitioner shall file his brief in chief on or before **October 2, 2000**, with respondent's answer brief due forty-five (45) days after the filing of petitioner's brief, and petitioner's reply brief, if any, due twenty (20) days after filing of respondent's answer brief in accordance with the Rules of Appellate Procedure;

IT IS FURTHER ORDERED that oral argument may be requested pursuant to Rule 12-214 NMRA.

IT IS SO ORDERED.

WITNESS, the Hon. Pamela B. Minzner, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 14th day of August, 2000.

(SEAL)

/s/ Kathleen Jo Gibson

Kathleen Jo Gibson, Chief Clerk
of the Supreme Court of the
State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

August 8, 2000

NO. 26,385

CHRISTOPHER MORA,

Petitioner,

CR-94-03049

vs.

RONALD L. LYTLE, Warden,

Respondent.

ORDER

WHEREAS, this matter came on for consideration by the Court upon a petition for writ of certiorari filed pursuant to Rule 12-501 NMRA and response thereto, and the Court having considered said pleadings and being sufficiently advised, Chief Justice Pamela B. Minzner, Justice Joseph F. Baca, Justice Gene E. Franchini, Justice Patricio M. Serna, and Justice Petra Jimenez Maes concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is GRANTED. Further action in the case, including the filing of briefs, if any, shall be as directed by further order of this Court; and

IT IS FURTHER ORDERED that the clerk in the Second Judicial District Court shall prepare and forward the record proper and transcript of proceedings, if any, in this matter.

IT IS SO ORDERED.

WITNESS, the Hon. Pamela B. Minzner, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 8th day of August, 2000.

/s/ Kathleen Jo Gibson
(SEAL) Kathleen Jo Gibson, Chief Clerk
of the Supreme Court of the
State of New Mexico

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

CHRISTOPHER MORA,

Petitioner,

vs. CR-94-03049

Ron Lytle, Warden, Southern
New Mexico Correctional Facility,

Respondent.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

(Filed May 12, 2000)

THIS MATTER having come before the Court, the court having heard argument, the parties having submitted briefs and Findings of Fact and Conclusions of Law, the Court having prepared Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that the Petitioner Christopher Mora's Petition for Writ of Habeas Corpus is DENIED.

/s/ W. John Brennan
W. JOHN BRENNAN
District Court Judge

Submitted by

/s/ Lisa Trabaudo
Lisa Trabaudo
Deputy District Attorney

5/5/00 approved
Nancy Hollander
Gary W. Nelson
Attorneys for Mora

SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

CHRISTOPHER MORA,

Petitioner,

vs. **CRCR 94-03049**

RONALD L. LYTLE, Warden,

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Apr. 28, 2000)

THIS MATTER comes to the Court's attention as a result of an evidentiary hearing on Petitioner's Petition for Writ of Habeas Corpus arguing ineffective assistance of counsel, which was held by this Court on October 28, 1999. The Court having considered all of the evidence, makes the following Findings of Fact and Conclusions of law:

FINDINGS OF FACT

1. On February 5, 1996, Petitioner, Christopher Mora, was convicted after a jury trial of first degree felony murder with criminal sexual contact as the underlying felony, criminal sexual contact of a child under thirteen, and child abuse, intentionally caused, resulting in death or great bodily harm.

2. Mora appealed the trial verdict to the Supreme Court of New Mexico.

3. The New Mexico Supreme Court filed its Opinion on November 17, 1997, affirming the convictions for felony murder and criminal sexual contact.

4. Mora filed his Petition of Writ of Habeas Corpus and Memorandum in Support on January 27, 1999.

5. New Mexico attorneys Leon Taylor and Cliff McIntyre represented Mora at his trial.

6. Assistant District Attorneys Stan Whitaker and Lisa Trabaudo prosecuted the case.

7. Cliff McIntyre and Randi McGinn, who was qualified as an expert, testified at the evidentiary hearing on Mora's Petition for Habeas Corpus, held on October 28, 1999.

Alleged conflict of interest

8. Just before Mora testified, the State advised the Court outside the jury's presence that a police officer had inadvertently overheard Taylor telling Mora, "you're going to have to lie."

9. In chambers, prior to Mora's testimony, defense trial counsel adamantly denied the accusation.

10. In chambers, prior to his testimony, Mora denied the accusation.

11. Neither Taylor nor McIntyre thought a conflict of interest had developed when Taylor was accused of telling his client to lie.

12. Before Mora took the stand, Whitaker informed the Court that he would seek to call in rebuttal the

witness who allegedly heard the "going to have to lie" statement.

13. The Court did not rule on the rebuttal witness question before Mora took the witness stand.

14. Mora's trial counsel did not withdraw or ask for a continuance.

15. Mora's counsel asked Mora if he was telling the truth during direct exam.

16. Mora was not cross-examined by the State regarding the accusation made by the State.

17. The State did not imply in any way during cross-examination of Mora, during closing arguments, or before the jury that trial counsel had directed Mora to lie.

[sic] arguments, or before the jury that trial counsel had directed Mora to lie.

18. The state's potential rebuttal witness (the police officer) did not testify regarding what he overheard.

Absence of constitutional objection to testimony of Joseph Sena

19. Mora made a pre-trial statement to police regarding a telephone call he made to Joseph Sena at or around the time of Christina Sierra's fatal injuries.

20. Detective Vicky Ortiz took a telephonic tape recorded statement from Joseph Sena on December 8, 1994.

21. Joseph Sena, a friend of Mora, denied that he spoke with Mora on Thanksgiving morning, contradicting

Mora's testimony. Sena stated in a tape recorded statement that he did not talk on the phone with Mora that day. Sena stated that he was at a friend's house when Mora made a telephone call to his house, and Sena's mother answered the phone. Sena said in his statement that Mora then went over to the house where Sena was. It was Thanksgiving Day, which would increase the reliability of Sena's memory regarding where he was and any conversations he had with Mora that day.

22. Joseph Sena died prior to trial.

23. Before trial, the State gave notice that it intended to introduce evidence, pursuant to the catch-all exceptions to the hearsay rule, Rule 11-803(X) NMRA 1996 and Rule 11-804(B)(5) NMRA 1996, that Detective Ortiz spoke to Sena and that Sena allegedly told Detective Ortiz he did not talk to Mora on that date at that time.

24. Neither the transcript nor the tape recording of the conversation with Sena was admitted at trial. The taped conversation was admitted into evidence at the evidentiary hearing on the Petition for Habeas Corpus.

25. At trial, the State introduced testimony from Detective Ortiz regarding Sena's taped statement.

26. Mora's trial attorneys objected to the introduction of testimony regarding Sena's statement based on hearsay and prejudice.

27. Prior to Detective Ortiz's testimony, the Court heard arguments of counsel.

28. The Court overruled the hearsay objections and allowed the introduction of testimony regarding Sena's statement.

29. Defense trial counsel never made an objection to Mora's alleged constitutional right to confrontation until after the jury heard Detective Ortiz's description of the statement and the Court had already ruled on its admissibility.

30. The New Mexico Supreme Court did not address whether the admission of hearsay violated Mora's right to confrontation because the issue had not been preserved. *Mora*, 1997-NMSC-060, ¶ 47, n.1, 124 N.M. 346, 950 P.2d 789.

31. After the testimony was heard by the jury, trial counsel moved for a mistrial based on a hearsay objection and confrontation clause objection, which was denied by the Court.

Absence of objection to State's introduction of character evidence in closing argument

32. During the trial the prosecution introduced evidence of Mora's plea of guilty to possession of stolen property over Mora's objection to the use of his plea as a prior conviction.

33. The New Mexico Supreme Court held: "the State did not use this conviction as substantive evidence of Petitioner's guilt." *State v. Mora,* 1997-NMSC-060, ¶ 62.

34. Defense trial counsel introduced the facts surrounding the crime into evidence.

a. The victim's mother, Andrea Garcia, was with Mora when he found the firearm.

b. The crime was one of possession of a stolen firearm.

35. Defense trial counsel discussed bringing out the facts surrounding the conviction to show that Mora and Garcia were in a car when Mora found a gun and that Mora was not a gangster intending to commit crimes. Defense trial counsel stated during closing argument that Mora was "the hardest working boy you'll ever meet."

36. Defense trial counsel in closing argument and redirect of Mora opened the door to the introduction of testimony and argument that Mora "was caught with a Tec-9. . . . This is not a mild-mannered young man."

37. The New Mexico Supreme Court held that Mora's trial attorney opened the door to the prosecutor's statements during closing argument. *See Mora,* 1997-NMSC-060, ¶ 63.

Absence of objection to testimony that Mora requested an attorney

38. At trial, the State introduced a taped statement Mora made to Detective Vicky Ortiz.

39. Defense trial counsel objected to the introduction of the statement without a foundation that Mora had waived his right to remain silent and his right to an attorney.

40. The beginning of the statement provided a foundation. In that statement, Ortiz told Mora she could not speak with him because she believed he had invoked his Fifth Amendment rights. Mora denied invoking his rights. He stated that while he and Andrea Garcia were at the hospital on Thanksgiving Day, they were approached by a police officer, Officer Allen, who advised them of their rights. Mora said that Virginia Saavedra, the mother of

Andrea Garcia and the grandmother of the victim, requested an attorney, but that he had not requested an attorney.

41. Defense trial counsel did not object to the testimony regarding any request for an attorney that Mora may have made.

42. Mora testified on direct examination that he had not requested an attorney after he had been read his *Miranda* rights.

43. On rebuttal, the State elicited testimony from Officer Allen that Mora had requested an attorney at the hospital.

44. On cross-examination by Taylor, Officer Allen testified that although Virginia Saavedra called an attorney for her daughter, Andrea Garcia, Mora did not solicit an attorney.

45. No comments on Mora's alleged request for an attorney were made during the State's closing arguments.

Defense counsel's decision not to recall witnesses

46. During trial, Mora's attorneys discovered that the prosecution did not disclose to the defense tape recorded statements of two witnesses, Henry Campos, and Virginia Saavedra, both of which were made in the prosecutors' presence.

47. Mora was provided with a copy of the tape and transcripts of the tape during trial.

48. Defense trial counsel moved for a mistrial based on the late disclosure of the tapes of those interviews.

49. The Court denied Petitioner's motion for a mistrial but allowed Petitioner the opportunity to recall witnesses.

50. The defense did not recall any of the State's witnesses.

51. McGinn testified at the evidentiary hearing that trial counsel should have recalled Saavedra to impeach Andrea Garcia's testimony.

52. McIntyre testified at the evidentiary hearing that Saavedra was not recalled as a witness because she was a hostile witness.

CONCLUSIONS OF LAW

53. To establish ineffective assistance of counsel, Mora must show that his trial counsel made errors so serious that he was not functioning as "counsel" as required by the Sixth Amendment and that this deficient performance prejudiced his defense. *See Strickland v. Washington,* 466 U.S. 668, 687 (1984).

54. The test under the federal and state Constitutions is identical. *See State v. Brazeal*, 109 N.M. 752, 755, 790 P.2d 1033, 1036 (Ct. App. 1990).

55. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland,* 466 U.S. at 694.

56. In reviewing a claim of ineffective assistance of counsel, the Court "will not second guess trial tactics and

strategy of defense counsel." *State v. Gonzalez,* 113 N.M. 221, 230, 824 P.2d 1023, 1031 (1992).

57. To create a presumption of ineffective assistance of counsel, "the defendant must establish that an *actual* conflict of interest arose that affected defense counsel's performance." *Churchman v. Dorsey,* 122 N.M. 11, 13, 919 P.2d 1076, 1078 (1996).

58. No actual conflict of interest existed between trial counsel and Mora. It was in the interests of both Taylor and Mora to show that both were honest. *See State v. Robinson,* 99 N.M. 674, 679, 662 P.2d 1341, 1346 (1983) ("An actual conflict exists if a defendant's counsel '*actively* represented conflicting interests.' ")

59. The totality of the circumstances surrounding Joseph Sena's hearsay statements show particularized guarantees of trustworthiness indicating that Mora's trial counsel's failure to object on constitutional grounds to the admission of the testimony would not have affected the Court's decision to admit the hearsay testimony under Rule 11-803(X) NMRA 1996 or Rule 11-804(B)(5) NMRA 1996.

60. Mora has not shown that the result of the trial would have been different had the hearsay statements been excluded. *See Strickland,* 466 U.S. at 694-95. The totality of the evidence before the jury, considering the proceeding as a whole, in which the jury evaluated the credibility of Mora and the credibility of Andrea Garcia, demonstrates that the result of the trial would have been the same.

61. Defense trial counsel's decision not to recall Virginia Saavedra to the stand was a strategic decision not

to cross-examine a hostile witness any further, *See Gonzalez,* 113 N.M. at 230, 824 P.2d at 1031 (court "will not second guess trial tactics and strategy of defense counsel") and was not ineffective assistance of counsel.

62. There was no error in the prosecutor's references, upon rebuttal, to the nature of Mora's prior conviction and comments on his character. *See Mora,* 1997-NMSC-060, ¶ 63. Having opened the door to the State's references, the trial attorney had no grounds to object to those references. Thus, it was not ineffective assistance of counsel to fail to object to those references.

63. Defense trial counsel did not preserve the issue of whether his Constitutional rights had been violated by any comment on his alleged request for an attorney after he had been informed of his rights under *Miranda v. Arizona,* 384 U.S. 436 (1966).

64. A violation of a defendant's privilege against self-incrimination has been held to be fundamental error. *See State v. Hennesey,* 114 N.M. 283, 286-87, 837 P.2d 1366, 1369-70 (Ct. App. 1992). Fundamental error constitutes grounds for review in a habeas petition. *See Duncan v. Kerby,* 115 N.M. 344, 346, 851 P.2d 466, 468 (1993).

65. Even assuming fundamental error occurred in this case, the other evidence before the jury "was so overwhelming that any prejudice or harmful effect of any inference the jury might have drawn from the comments is minimal." *Hennesey,* 114 N.M. at 289, 837 P.2d at 1372. Thus, the trial attorney's failure to object to ambiguous testimony that Mora had requested an attorney in light of the other evidence before the jury did not affect the outcome of the trial.

66. Mora was not prejudiced by his trial attorney's failure to object to Mora's alleged request for an attorney.

67. Mora was not prejudiced by the overall performance of his trial counsel.

All requested Findings and Conclusions submitted by the parties hereto not in accordance with the foregoing are hereby refused the same as if each of said requested Findings and Conclusions were clearly marked refused as to each paragraph.

/s/ W John Brennan
W JOHN BRENNAN
DISTRICT COURT JUDGE

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. CRCR 94-03049
DA#: 94-4776-01

STATE OF NEW MEXICO,

Plaintiff,

vs.

CHRISTOPHER MORA,
DOB: 03/14/76
SSN: 585-31-9274
ADD: Dept. of Corr.,

Defendant.

"AMENDED"

JUDGMENT, SENTENCE AND COMMITMENT

(Filed Mar. 24, 1998)

On March 21, 1996, this case came before the Honorable W. JOHN BRENNAN, District Judge, for sentencing, the State appearing by LISA MURRAY TRABAUDO, Assistant District Attorney, the Defendant appearing personally and by his attorneys, LEON TAYLOR and CLIFF MCINTYRE, and the Defendant having been convicted on February 05, 1996, pursuant to GUILTY verdict, accepted and recorded by the Court, of the offenses of:

1. FIRST DEGREE MURDER (FELONY MURDER), with the underyling offense being Criminal Sexual Contact, occurring on or about November 24, 1994, as charged in Count 1 of Indictment CR 94-03049;

2. CRIMINAL SEXUAL CONTACT IN THE THIRD DEGREE (CHILD UNDER 13), occurring on or about November 24, 1994, as charged in Count 3 of Indictment CR 94-03049; and

3. CHILD ABUSE (INTENTIONALLY CAUSED) (DEATH OR GREAT BODILY HARM), occurring on or about November 24, 1994, as charged in Count 4 of Indictment CR 94-03049, which is vacated pursuant to New Mexico Supreme Court Mandate No. 23,493, filed December 04, 1997.

The Defendant is hereby found and adjudged guilty and convicted of said crimes, and is sentenced to the custody of the Corrections Department to be imprisoned for the term of life, as to Count 1; three (3) years as to Count 3, to be run concurrently for a total term of life imprisonment.

THEREFORE, You, the Corrections Department of the State of New Mexico are hereby commanded to take the above-named Defendant in custody and confine him for the above term.

Defendant is to receive credit for 18 days pre-sentence confinement and for post-sentence confinement until delivery to the place of incarceration.

IT IS FURTHER ORDERED that the Defendant be placed on parole for five (5) years after release and be required to pay parole costs.

/s/ W. John Brennan
W. JOHN BRENNAN
DISTRICT JUDGE

APPROVED:

/s/ Lisa Trabaudo
Assistant District
Attorney

3/20/98 – approved by Leon Taylor via telephone
Attorney for Defendant

STATE OF NEW MEXICO, Plaintiff-Appellee, vs. CHRISTOPHER MORA, Defendant-Appellant.

Docket No. 23,693

SUPREME COURT OF NEW MEXICO

124 N.M. 346; 1997 NMSC 60; 950 P.2d 789; 1997 N.M. LEXIS 464; 37 N.M. St. B. Bull. 37

November 17, 1997, Filed

COUNSEL: Freedman, Boyd, Daniels, Hollander, Guttman & Goldberg, P.A., Nancy Hollander, Albuquerque, NM, for Appellant.

Hon. Tom Udall, Attorney General, Elizabeth Blaisdell, Assistant Attorney General, Santa Fe, NM, for Appellee.

JUDGES: PATRICIO M. SERNA, Justice. WE CONCUR: GENE E. FRANCHINI, Chief Justice, JOSEPH F. BACA, Justice, PAMELA B. MINZNER, Justice, M. CHRISTINA ARMIJO, Judge, New Mexico Court of Appeals (sitting by designation).

OPINION BY: PATRICIO M. SERNA

OPINION: OPINION

SERNA, Justice.

Defendant Christopher Mora was convicted of first-degree murder (felony murder, with criminal sexual contact as the underlying felony), criminal sexual contact in the third degree (child under thirteen) and intentional child abuse resulting in great bodily harm or death. The jury found Defendant not guilty of criminal sexual penetration and negligent child abuse. Defendant appeals his convictions and, alternatively, his sentencing for the convictions.

Defendant raises the following issues on appeal: (1) that his felony murder conviction was unconstitutional because the State did not prove all essential elements of the crime; (2) that his convictions for intentional child abuse resulting in death and criminal sexual contact were unconstitutional because the convictions were not supported by sufficient evidence; (3) that the State's failure to disclose the existence of recorded interviews of two critical prosecution witnesses, until after the defense had cross-examined them, denied Defendant his right to prepare a defense, to confront and cross-examine witnesses and to a fair trial; (4) that the admission of the hearsay testimony of a deceased witness violated Defendant's right to confrontation because the testimony contained no particularized guarantees of trustworthiness, and the testimony was more prejudicial than probative; (5) that two autopsy photographs should not have been admitted because they were irrelevant and because their prejudicial effect substantially outweighed their probative value; (6) that the admission of his guilty plea to possession of stolen property was improper because its prejudicial effect substantially outweighed any probative value of the evidence; (7) that the prosecutor improperly used the prior guilty plea to argue Defendant's guilt in closing argument; (8) that his sentence violated his protection against double jeopardy; and (9) that the above constitute cumulative error that denied Defendant due process and a fair trial. We affirm the trial court on all issues except the sentencing of Defendant for both felony murder and intentional child abuse resulting in death; therefore, we need not address the issue of whether cumulative error deprived Defendant of a fair trial.

FACTS

This case involves the tragic death of a twenty-three-month-old child, Christina Sierra. Christina was pronounced dead on November 25, 1994. Christina was killed by an intentional blow to her skull, and was apparently the victim of a sexual assault. A jury found Defendant Christopher Mora responsible for Christina's death, and convicted him based on the following facts presented at trial.

Defendant and Andrea Garcia, the mother of Christina Sierra, began dating in September 1993. In September 1994, Defendant and Garcia moved into an apartment together. Christina lived with Defendant and Garcia. Garcia was attending school during the day and Garcia's mother, Virginia Saavedra, took care of Christina while Garcia attended school.

Christina had been receiving medical treatment, and was admitted to the hospital, in the weeks prior to her death. Prior to the time Defendant moved in with Garcia, Christina had not had an extensive medical history. Christina died on November 25, 1994; however, the evidence showed, and Defendant does not dispute, that the fatal blow to Christina's skull occurred on November 24, 1994, Thanksgiving day.

At trial, Defendant and Garcia provided conflicting testimony regarding the events which occurred on November 24. Garcia testified that on Thanksgiving morning, she and Defendant got out of bed at the same time, and she went to attend to Christina. Later, Christina, Garcia and Defendant were watching the Macy's Thanksgiving parade on television. Garcia decided to take a shower and she left Christina, who Garcia testified was awake and alert, in the care of Defendant. Garcia proceeded to take a lengthy shower of approximately twenty to twenty-five minutes. When Garcia emerged from the bathroom, according to Garcia's testimony, Garcia saw Defendant walking down the hall with Christina apparently asleep on his shoulder. Defendant told Garcia he was putting Christina to bed because she had fallen asleep. Garcia testified that she thought it was strange that Christina was asleep, because Christina did not usually take a nap so soon after she woke up in the morning.

Defendant, on the other hand, testified at trial that Christina had awakened the morning of November 24, crying. According to Defendant, he and Garcia had been having sex early Thanksgiving morning when they were interrupted by the cries of Christina coming from her bedroom. Defendant testified that Garcia did not want to attend to the baby, but that Defendant insisted that she do so. Defendant testified that Garcia slammed the bedroom door as she went to Christina's bedroom to check on her. Defendant testified that when Garcia took Christina from her room into the living room, Christina was "crying real loud . . . not just a cry . . . screaming" and that "all of a sudden she just stopped crying." Defendant testified that when he emerged from the bedroom into the living room, about twenty minutes later, Christina appeared to be asleep in her stroller. Defendant testified that Garcia tried to feed Christina some cereal but Christina would not eat. Garcia then went to take a shower, leaving Christina in Defendant's care. While Garcia was in the shower, according to Defendant, Defendant went into another room to answer a phone call from Joseph Sena. Upon finishing the call, Defendant testified that he put the sleeping child back into her bed, while Garcia was coming out of the bathroom. Defendant testified that Garcia had a "scared look on her face" when he put Christina in her bed.

Defendant's testimony at trial appeared to support the defense theory that Garcia may have caused Christina's injuries. The jury, however, heard testimony that Defendant made conflicting statements to the police and to Garcia's cousin Randy Chavez. According to the testimony of Albuquerque Police Detective Vicki Ortiz, in his prior statement to the police made eight days after Thanksgiving, Defendant said that when he got up that Thanksgiving morning, he prepared cereal for Christina, which Christina ate. Defendant also said in his statement "and then Christina was in her stroller and [Andrea] came and said uh, you wanna to take a shower, Christina, you know, she was talking to her, she couldn't talk back. And she said, no, like she didn't wanna stay in the stroller. She always wanted to stay in the stroller, I don't know." These statements conflicted with Defendant's testimony at trial that Christina had been asleep all morning.

The jury also heard the testimony of Randy Chavez who testified that Defendant had told him in the hospital waiting room that Christina had fallen asleep on the couch while Andrea was taking a shower, and that Defendant put Christina to bed. Later that day, Randy Chavez heard Defendant say that Christina was falling asleep, so he picked her up, and when Garcia finished her shower, Defendant and Garcia put Christina to bed together. These accounts also differed from Defendant's trial testimony that Christina had been asleep all morning.

Both Defendant and Garcia testified that they soon realized Christina was unconscious and not breathing. Garcia called 911. The paramedics arrived and transported

Christina to the University of New Mexico Hospital. William Chavez, a paramedic who arrived at the scene, questioned Garcia about older bruises on Christina, and he testified that Garcia responded to him that Christina had fallen off the bed a few days earlier. Garcia traveled in the ambulance with Christina, but Defendant stayed behind at the apartment. Defendant arrived at the hospital approximately an hour later. Police detectives investigated the apartment and gathered evidence some time after the Defendant left the apartment.

Christina was treated by a variety of medical personnel at the hospital. Several members of the emergency room staff and the intensive care staff noted a scratch or tear near Christina's anus, or perineum. No member of the intensive care staff noted any vaginal bruising on Christina. Dr. Robert Katz, the director of the pediatric ICU, testified that he notified a specialist in sexual abuse, Dr. Renee Ornelas. At trial, Dr. Ornelas was recognized as an expert in pediatrics with a specialty in sexual abuse. Dr. Ornelas examined Christina before her death, and Dr. Ornelas testified at trial that the tear near Christina's anus was actually a "large, deep tear." Dr. Ornelas also testified at trial that she discovered perivaginal bruising and blood. In Dr. Ornelas' opinion, Christina had been anally raped within twenty-four hours of her examination.

Christina was pronounced dead at 11:00 a.m. on November 25, 1994. A CAT scan, surgery, and finally the autopsy revealed recent, severe, soft-tissue injuries to the head, a skull fracture, and blood clots consistent with previous episodes of trauma. There was evidence that on November 14, 1994, doctors took full-body x-rays of Christina which showed that Christina had no skull fractures at that time. Dr. Blaine Hart, an expert in neuroradiology, testified at trial that he reviewed the x-rays of Christina's skull taken on November 14, 1994 and November 24, 1994. Dr. Hart testified that Christina's fracture was similar in degree of severity to those fractures he had seen in children ejected from a car in a high-speed freeway accident. Dr. Hart further testified that the head trauma which caused Christina's death most likely occurred within a day of the x-ray taken on November 24, 1994. The operating physician, Dr. Nevin Baldwin, estimated at trial that the "acute event" which caused Christina's head injury occurred within approximately two hours of when Dr. Baldwin began operating on Christina on Thanksgiving morning.

At trial, Defendant called as an expert Dr. James Wilkie. The court recognized Dr. Wilkie as an expert in emergency room medicine. Dr. Wilkie examined Christina's medical records, including the x-rays and autopsy photographs taken after the fatal injury had occurred. Dr. Wilkie testified that, in his opinion, the cut near Christina's anus was approximately one week old. Dr. Wilkie's testimony contradicted Dr. Ornelas' testimony by stating that the autopsy contained no evidence of any vaginal bruising or bleeding. Further, Dr. Wilkie testified that the cuts and red marks described by Dr. Ornelas in her testimony could have been caused by various medical treatments, including suppository inserts, which Christina had received in the weeks prior to her death. In Dr. Wilkie's opinion, no evidence of sexual abuse existed.

Dr. Ornelas' testimony relied on two autopsy photographs of Christina. Defendant objected to the use of these photographs on the grounds that the autopsy photographs would not show a person in the same condition as when that person had been alive, and additionally, on the grounds that no foundation had been laid to establish who was depicted in the photographs. The court allowed the State to lay a foundation. Later, the defense objected to Dr. Ornelas' use of the photographs on the grounds that Dr. Ornelas had no personal knowledge that the photographs were of Christina, and that the photos were substantially more prejudicial than probative. The objections were overruled.

Detective Vicki Ortiz and Detective Brian Sanchez were assigned to investigate Christina's death. Detective Ortiz interviewed Joseph Sena, the friend Defendant testified he had spoken with while Garcia was taking a shower that Thanksgiving morning. Detective Ortiz testified at trial that Joseph Sena had told her that he did not talk to Defendant on November 24. Joseph Sena died before Defendant's trial, and the trial court judge allowed Detective Ortiz to testify as to Sena's statement to her. Defendant objected to this testimony as inadmissible hearsay, irrelevant, and improper use of extrinsic evidence for purposes of collateral impeachment. The judge overruled Defendant's objections and allowed the jury to hear the statement.

Detective Sanchez interviewed Virginia Saavedra, the victim's grandmother, on November 30, 1994, and he interviewed Henry Campos, Saavedra's ex-husband, on November 24, 1994. The State turned over these interviews to Defendant. However, interviews of Saavedra and Campos occurring on two other occasions were not turned over. During cross-examination of Campos on the second day of Defendant's trial, January 23, 1996, Campos mentioned he had answered questions on more than one occasion. Campos' testimony conflicted with the prosecution's assurance that all available evidence had been turned over to the defense. The defense moved for a mistrial, and the court denied the motion on the grounds that the court had no evidence before it that information had been withheld at that time.

On January 25, 1996, four days into the trial, the prosecution informed the court that they had discovered the second taped interviews of both Saavedra and Campos. The prosecution claimed they had not remembered the second interviews because the tapes had not been tagged into evidence. The prosecution turned the tapes over to Defendant, and on the fifth day of trial, January 26, 1996, Defendant renewed his motion for mistrial, claiming that there were items in the taped interviews that would have affected the defense's cross-examination of witnesses. After reviewing the transcripts of the tapes, the trial court denied the motion for mistrial, finding that there was little difference between Campos' taped statement and his trial testimony. As to Saavedra's interview, the trial court stated that there were areas of inquiry that Defendant might want to pursue, based on the taped interview. The trial court ruled that it would allow Defendant to recall any witness as a result of Saavedra's taped interview; however, the defense chose not to recall any witnesses.

ISSUE ONE - FELONY MURDER

Defendant was charged with the crime of first-degree felony murder. NMSA 1978, Section 30-2-1(A)(2) (1994) sets forth the crime of felony murder as follows: "Murder in the first degree is the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused . . . in the commission of or attempt to commit a felony. . . . " In New

Mexico, the State must prove the defendant intended to kill, or was knowingly heedless that death might result from defendant's conduct, in addition to proving that the killing occurred during the commission of a felony. *State v. Ortega,* 112 N.M. 554, 563, 817 P.2d 1196, 1215 (1991). Further, the New Mexico felony murder rule "only serves to raise second-degree murder to first-degree murder when the murder is committed in the course of a dangerous felony." *State v. Campos,* 1996 NMSC 043, ¶17, 122 N.M. 148, 921 P.2d 1266. The jury in this case needed to find that Defendant killed Christina in the commission of an inherently dangerous felony and that Defendant intended Christina's death, or knew that his actions would create a strong probability of death.

The jury found Defendant guilty of the crime of felony murder, with the underlying felony being criminal sexual contact of a minor. Defendant argues that the felony murder conviction should be reversed because (1) the underlying felony (criminal sexual contact) was not inherently dangerous so as to invoke the felony murder rule, (2) the evidence was insufficient to prove Defendant intended to kill Christina, and (3) the evidence was insufficient to prove that any murder was committed during the commission of any criminal sexual contact.

1) Inherent Danger of Underlying Felony of Criminal Sexual Contact

Defendant argues that criminal sexual contact of a minor is not an inherently dangerous felony, and thus not a basis for a felony murder conviction. Defendant argues that while criminal sexual penetration of a minor may be inherently dangerous, mere contact is not. Defendant was acquitted of criminal sexual penetration of a minor and this, Defendant argues, supports a conclusion that the criminal sexual contact in this case was not inherently dangerous.

A presumption of inherent danger is appropriate in a felony murder case where the predicate felony is a first-degree felony, but not where the felony is of a lesser degree. *State v. Bankert,* 117 N.M. 614, 620, 875 P.2d 370, 376 (1994); *State v. Harrison,* 90 N.M. 439, 442, 564 P.2d 1321, 1324 (1977) *rev'd by rule on other grounds, Tafoya v. Baca,* 103 N.M. 56, 57, 60, 702 P.2d 1001, 1002, 1005 (1985). In this case, the Defendant was charged with both criminal sexual penetration of a minor, and criminal sexual contact of a minor. Criminal sexual penetration, as defined in NMSA 1978, Section 30-9-11(C) (1995), is a first-degree felony when it is perpetrated on a child under thirteen years of age. Criminal sexual contact of a minor, as defined in NMSA 1978, Section 30-9-13 (A) (1991), is a third-degree felony when it is perpetrated on a child under thirteen years of age. In this case, a conviction of criminal sexual penetration, a first-degree felony, would have carried with it the presumption of inherent danger necessary to support a felony murder conviction. Defendant was not convicted of criminal sexual penetration, but was convicted of the third-degree felony of criminal sexual contact of a minor. Thus, no presumption of inherent danger exists since criminal sexual contact of a minor is not a first-degree felony. However, a lesser degree felony may still support a felony murder conviction, depending on the circumstances surrounding the commission of the crime.

This Court suggested in *Harrison* that it is for the jury to decide the inherent danger of an underlying crime in a felony murder case. 90 N.M. at 442, 564 P.2d at 1324. The *Harrison* court quoted R. Perkins, Criminal Law 34 (1957) as follows:

> One who is perpetrating a felony which seems not of itself to involve any element of human risk, may resort to a dangerous method of committing it, or may make use of dangerous force to deter others from interfering. If the dangerous force thus used results in death, the crime is murder just as much as if the danger was inherent in the very nature of the felony itself.

90 N.M. at 442, 564 P.2d at 1324. The Court then stated, "In the final analysis this is for the jury to decide in each case, subject to review by the appellate courts." *Id.*

In *Harrison,* this Court considered two approaches in determining whether a felony is inherently dangerous for felony murder purposes. *Id.* Under the first approach, "the felony is examined in the abstract to determine whether it is inherently dangerous to human life." *Id. See, e.g., People v. Lee,* 234 Cal. App. 3d 1214, 286 Cal. Rptr. 117, 122 (Cal. App. 1991); *State v. Wesson,* 247 Kan. 639, 802 P.2d 574, 579 (Kan. 1990) *superseded by statute as stated in State v. Mitchell,* 262 Kan. 687, 942 P.2d 1, 5 (Kan. 1997). This "abstract approach" analyzes the elements of the underlying felony without regard to the particular facts of the case. *Lee,* 286 Cal. Rptr. at 122. The abstract approach involves a two-step process by which the court first examines the "primary element" of the offense at issue to determine whether it involves the requisite danger to life. *Id.* The court then looks to the "factors elevating the offense to a felony" to determine whether the felony, taken in the abstract, is inherently dangerous to human life. *Id.* Thus, under the abstract approach, the court decides as a matter of law whether a particular felony is inherently dangerous to human life.

Under the second possible approach cited by *Harrison,* "both the nature of the felony and the circumstances surrounding its commission may be considered to determine whether it was inherently dangerous to human life." 90 N.M. at 442, 564 P.2d at 1324. Some courts have used this factual approach to determine inherent danger for purposes of felony murder. *See, e.g., State v. Noren,* 125 Wis. 2d 204, 371 N.W.2d 381, 385 (Wis. App. 1985); *State v. Stewart,* 663 A.2d 912, 919-920 (R.I.1995). When applying the factual approach, a court looks to the particular facts of the case to decide whether the defendant carried out the predicate felony in a manner dangerous to human life. Thus, a proscribed offense which on its face does not appear to be a dangerous felony, may be carried out in a manner which would allow it to serve as a predicate felony for felony murder. *Noren,* 371 N.W.2d at 385.

In *Harrison,* this Court adopted the factual approach. 90 N.M. at 442, 564 P.2d at 1324. We see no reason to deviate from that ruling today. We cannot say as a matter of law whether a particular felony is or is not inherently dangerous to human life. This decision is necessarily fact-specific. We cannot say as a matter of law that criminal sexual contact of a minor is never an inherently dangerous felony. As stated in *Harrison,* it is for the jury to decide, subject to appellate review, whether a felony is inherently dangerous. *Id.* In this case, it was for the jury to decide whether the facts of the case warranted a conclusion that the criminal sexual contact of a minor was committed under inherently dangerous circumstances.

Here, the trial court instructed the jury that it could find Defendant guilty of felony murder if it first found that Defendant "committed or attempted to commit the crime of Criminal Sexual Contact of a Minor (Child Under 13) *under circumstances or in a manner dangerous to human life* . . . " (emphasis added). We conclude that there was sufficient evidence to support the trial court's decision to instruct the jury regarding the dangerousness of the circumstances surrounding the underlying felony of criminal sexual contact. *Cf. State v. Calvillo,* 110 N.M. 114, 120, 792 P.2d 1157, 1163 (Ct. App. 1990) (jury instruction not required where there is insufficient evidence to support it).

It was proper for the jury to determine whether the crime of criminal sexual contact was inherently dangerous for purposes of felony murder. Therefore, on appeal we may overturn the jury's verdict only upon a showing of insufficient evidence. Under this standard, the Court views the evidence in the light most favorable to upholding the verdict, resolving all conflicts and indulging all permissible inferences in favor of the verdict. *State v. Hernandez,* 115 N.M. 6, 26, 846 P.2d. 312, 332 (1993). The reviewing court does not weigh the evidence or substitute its judgment for that of the fact finder as long as there is sufficient evidence to support the verdict. *State v. Griffin,* 116 N.M. 689, 693, 866 P.2d 1156, 1160 (1993) (quoting *State v. Sutphin,* 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988)). In a case involving circumstantial evidence, such as the case before us, reasonable doubt is not precluded unless circumstantial evidence viewed in the light most favorable to the State gives rise to an equally reasonable inference of innocence. *State v. Apodaca,* 118 N.M. 762, 766, 887 P.2d 756, 760 (1994).

Based on the evidence presented at trial, a rational jury could have found that Defendant committed the crime of criminal sexual contact of a minor under circumstances dangerous to human life. First, the victim in this case was especially vulnerable – a 23 month old baby who had been very ill and who had been recently admitted to the hospital. Second, the jury reasonably could have inferred that Defendant committed the criminal sexual contact under a time pressure, while the baby's mother was in the shower. This time pressure, the jury reasonably could have inferred, resulted in Defendant committing sexual contact under hurried circumstances, causing Defendant to act in a manner dangerous to human life.

The jury in this case decided that Defendant committed an inherently dangerous crime justifying a felony murder conviction. The determination of the inherent dangerousness of this crime was properly before the jury. The jury determined that Defendant committed the crime of criminal sexual contact under circumstances or in a manner dangerous to human life, and a felony murder conviction therefore was proper. The record contains substantial evidence to support the jury's verdict and we will not upset the jury's finding of felony murder based on criminal sexual contact.

2) Sufficiency of Evidence to Prove Intent to Kill

In order to convict for felony murder in this case, the jury was instructed that it first must find that Defendant committed the underlying felony of criminal sexual contact (or alternatively, criminal sexual penetration), and that, additionally it must find that Defendant intended to kill the child, or knew that his actions created a strong probability of death or great bodily harm. The jury found each of these requisite elements to convict for felony murder, including intent, and we will not disturb the jury's finding unless there is insufficient evidence.

In New Mexico, there is a mens rea requirement for felony murder. *See Ortega,* 112 N.M. at 563, 817 P.2d at 1205; *Griffin,* 116 N.M. at 695, 866 P.2d at 1162; *Campos,* 1996 NMSC 043, ¶16. The felony murder intent requirement is satisfied if proof exists that the defendant intended to kill, knew that his actions created a strong probability of death or great bodily harm, or acted in a manner greatly dangerous to the lives of others. *Griffin,* 116 N.M. at 695, 866 P.2d at 1162.

Defendant argues that insufficient evidence exists to support a finding that Defendant intended to kill Christina. However, reviewing the evidence in the light most favorable to the State, a rational jury could have found beyond a reasonable doubt that Defendant intended to kill Christina, or at least that Defendant knew his acts created a strong probability of death or great bodily harm to her.

The State presented numerous experts who testified that Christina died as a result of a skull fracture which caused massive bleeding in the brain. Dr. Blaine Hart, the neuroradiology expert, testified that Christina's skull fracture was the result of severe force, inconsistent with a simple fall. In Dr. Hart's opinion, the fracture was caused either by striking the skull against a hard object, or by shaking the child and hitting the skull against a hard object. The State also presented the testimony of Dr. Nevin Baldwin, the neurosurgeon who operated on Christina, who stated that a skull would have to suffer an extreme impact to fracture in the way that Christina's skull was fractured. Even the Defendant's own expert, Dr. Wilkie, testified that, in his opinion, Christina was either struck against the wall or some other surface that was very hard. He agreed that the injury which killed the young child was intentionally inflicted.

A rational jury could infer, based on this medical evidence, that Christina's head injuries were intentionally inflicted. Given Dr. Hart's opinion that the injury which caused Christina's skull fracture occurred within twenty-four hours of the x-ray taken on Thanksgiving morning, and given Dr. Baldwin's opinion that the injury occurred approximately two hours before he operated on Christina on Thanksgiving morning, a rational jury could infer that Christina's injuries occurred that morning. And further, a rational jury could infer, from the evidence produced at trial, that the Defendant was the person who intentionally inflicted these injuries.

The jury heard the testimony of Detective Ortiz and Randy Chavez who both testified that the Defendant had told them Christina was awake Thanksgiving morning. This testimony contradicted Defendant's testimony on the stand that Christina had been asleep and unresponsive all morning. These inconsistent statements, plus the fact that Defendant was alone with Christina for approximately twenty-five minutes on Thanksgiving morning while Garcia was taking a shower, support the jury's verdict that it was Defendant rather than Garcia who intentionally inflicted the injury on Christina.

3) Sufficiency of Evidence to Prove the Murder Was Committed During the Commission of a Felony

Defendant argues that there was insufficient evidence to prove that the murder was committed during the commission of the underlying felony on which the jury verdict was based, which was criminal sexual contact. To support this argument, the Defendant points only to the conflicting testimony of Dr. Wilkie and Dr. Ornelas. Defendant points to Dr. Wilkie's testimony that, in his opinion, the cut near Christina's anus was approximately one week old. Dr. Ornelas testified that it was her opinion that the tear occurred less than 24 hours before her examination of Christina. Dr. Ornelas testified that she examined Christina on November 25. The Defendant argues that Dr. Ornelas' testimony was inconsistent with the theory that the head injury and the perineum injury were inflicted around the same time. According to Defendant, if Dr. Ornelas' testimony were true, it would mean that Christina's injury to the perineum occurred while she was in the hospital being treated for her skull fracture on November 24.

The State notes that Dr. Ornelas testified that the injuries occurred within twenty-four hours of her examination of Christina on Thanksgiving day, on November 25. Thanksgiving day was actually November 24. The State argues that the jury reasonably could have found that Dr. Ornelas actually examined Christina on Thanksgiving day, or that if she did examine Christina on the following day, it would have taken place early enough in the day to have put the time of the injury to the perineum within the same time frame as the head injuries.

Moreover, the State cites to testimony at trial that no evidence of the trauma was noted the day before Thanksgiving, November 23. Saavedra testified that on November 23, she changed Christina's diaper and did not note anything unusual. Christina, who had been admitted to the hospital in mid-November because of dehydration, was taken to the hospital on November 23 because her leg was swelling. Tillie Atencio, a nurse who had been treating Christina on November 23, testified that she did not notice anything on the outside of Christina's genital area or her perineal area. The nurse had placed a soft bag with adhesive on the top over Christina's vaginal area to try to catch a urine sample. Garcia testified that she changed Christina's diaper on Thanksgiving morning around 8:00 a.m., and she did not notice anything unusual at the time.

When Christina was taken to the emergency room, however, Dr. Steven Pilon, an E.R. physician, noted a scratch on Christina's perineum. After Christina's surgery, Yvonne Gabaldon, a nurse in the pediatric ICU, charted a small tear above Christina's rectum. Dr. Robert Katz, director of the pediatric ICU, testified that his resident Dr. Behnken had noted a tear around Christina's anus that day. Dr. Katz testified that he inspected the injury on Thanksgiving day, and that he paged Dr. Ornelas to come in and examine Christina.

From this testimony, a rational jury could have concluded that Christina did not have the tear on November 23, and that she did have the tear some time after 8:00 a.m. on November 24. Further, based on the evidence recited above, the jury reasonably could have concluded that the Defendant was alone with Christina for twenty-five minutes on Thanksgiving day, and that was when the injury to Christina's perineum occurred. Dr. Ornelas also testified to perivaginal bruising and blood, which she associated with sexual abuse. While the testimony of Dr. Wilkie and Dr. Ornelas conflicts regarding the extent and the timing of the injury, it is within the jury's province to determine the credibility of testimony. Based on the above evidence, we conclude there was sufficient evidence to prove that the murder was committed during the commission of the underlying felony on which the jury based its verdict, criminal sexual contact.

ISSUE TWO – SUFFICIENCY OF EVIDENCE FOR INTENTIONAL CHILD ABUSE RESULTING IN DEATH AND CRIMINAL SEXUAL CONTACT OF A MINOR

The Defendant also argues that there was insufficient evidence to support his convictions for intentional child abuse resulting in death and criminal sexual contact of a minor. The same evidence that allowed the jury to convict Defendant of felony murder also allowed the jury to convict Defendant of intentional child abuse resulting in death. We will discuss below, however, that the convictions for both felony murder and intentional child abuse resulting in death would result in double jeopardy. Therefore, we need not address the issue of whether there was sufficient evidence to support the conviction of intentional child abuse resulting in death.

We also hold that there was sufficient evidence to support Defendant's conviction of criminal sexual contact of a minor. While Defendant was acquitted of criminal sexual penetration and criminal sexual contact based on force to the vagina, the jury found Defendant guilty of criminal sexual contact based on force to the anus. As recited above, the jury heard testimony from various medical personnel that Christina had a scratch or tear near her anus. The jury saw autopsy photographs of this tear. The jury heard the testimony of an expert in sexual abuse, Dr. Ornelas, who testified that, in her opinion, Christina was the victim of sexual abuse which had occurred within twenty-four hours of the examination she performed on Christina prior to Christina's death. The jury heard testimony that the tear near Christina's anus was not noted by medical personnel the day before Thanksgiving when Christina had gone to the hospital because of illness. The jury heard testimony that neither Christina's mother nor her grandmother had noted any blood or tears near Christina's anus in the hours prior to the fatal blow to the head. The jury heard testimony that the Defendant was alone with the child for twenty to twenty-five minutes on Thanksgiving morning. Viewing the evidence in the light most favorable to upholding the verdict, we hold that a rational jury could have concluded that Defendant committed the crime of criminal sexual contact of a minor.

ISSUE THREE – STATE'S UNTIMELY DISCLOSURE OF TAPE RECORDED INTERVIEWS OF WITNESSES

Defendant argues that the State's failure to disclose the tape recorded interviews of Saavedra and Campos, until after the defense had cross-examined them, denied Defendant his right to prepare a defense, to confront and cross-examine witnesses, and to a fair trial. When evidence is disclosed for the first time during trial, this Court must consider the following factors to determine whether the error is reversible: (1) whether the State breached some duty or intentionally deprived the defendant of evidence; (2) whether the improperly non-disclosed evidence was material; (3) whether the non-disclosure of the evidence prejudiced the defendant; and (4) whether the trial court cured the failure to timely disclose the evidence. *State v. Sandoval,* 99 N.M. 173, 175-76, 655 P.2d 1017, 1019-20 (1982); *State v. Hall,* 107 N.M. 17, 19, 751 P.2d 701, 703 (Ct. App. 1987).

We assume the first three *Sandoval* factors were satisfied by the Defendant. Thus, the resolution of this issue hinges on whether the trial court cured the failure to timely disclose the evidence. In determining prejudice to a defendant "where the state initially deprives defendant of the evidence but later produces the evidence, the reviewing court should consider whether the failure to timely disclose the evidence was cured by the trial court." *Hall,* 107 N.M. at 19, 751 P.2d at 703 (citing *Sandoval,* 99 N.M. at 175, 655 P.2d at 1019). In this case, the trial court provided Defendant an opportunity to cure the failure to disclose the tapes when it allowed Defendant to reexamine any witness.

In *Hall,* the Court of Appeals was presented with a similar issue. The defendant in *Hall* claimed he was denied due process by the prosecution's failure to disclose certain of his personal papers that he claimed were essential to help him identify and secure witnesses. 107 N.M. at 19, 751 P.2d at 703. The trial court had issued several orders demanding that the prosecutor produce the papers, but the papers were not produced until several days before trial. *Id.* The defendant moved the trial court for a continuance, but the trial court denied the motion, stating that it would instead consider a several day recess if, during trial, good cause was presented by the defendant. *Id.* The defendant did not seek a recess during trial, and the Court of Appeals held that his inaction was "a cure of any prejudice that may have resulted from the untimely production." *Id.* Further, the court stated that it viewed the "inaction as a waiver of any claim that the trial court abused its discretion in not granting a continuance." *Id.*

In this case, the trial court offered defense counsel an opportunity to cross-examine any witness who had been called to testify. Defense counsel chose not to recall any of the witnesses. Therefore, we hold that Defendant waived his claim that the late disclosure of the tapes prevented him from effectively cross-examining witnesses, because defense counsel failed to recall any witness when given the opportunity to do so.

ISSUE FOUR – ADMISSION OF HEARSAY TESTIMONY OF DECEASED WITNESS

At trial, Detective Ortiz testified about statements Joseph Sena made to her concerning a telephone conversation that Defendant claimed he had with Sena while Garcia was in the shower the morning of the murder. According to Detective Ortiz, Sena denied that he spoke with Defendant that morning. Sena died before trial, and Defendant objected to the introduction of Sena's statement as evidence, claiming that the statement was inadmissible hearsay.[1]

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[1] At trial, Defendant did not timely object to the admission of Sena's statement on confrontation grounds, nor did he timely object on general constitutional grounds; therefore, we do not address Defendant's confrontation concerns on appeal. *See State v. Lucero,* 104 N.M. 587, 591, 725 P.2d 266, 270 (Ct.App.1986) (holding that denial of the right to confrontation may not be raised for the first time on appeal where the defendant's hearsay objection did not sufficiently alert trial

(Continued on following page)

The State argues that Sena's statement was admissible pursuant to Rule 11-804(B)(5) NMRA 1997 which allows a hearsay statement not covered by one of the many hearsay exceptions if the statement has equivalent circumstantial guarantees of trustworthiness, the statement is offered as evidence of a material fact, the statement is more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts, and the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement. Rule 11-804(B)(5) is not operative unless the declarant is unavailable as a witness, *see* Rule 11-804(B), which was the case here since Sena died before trial.

Sena's statement was offered to show the actions of Defendant during the relevant twenty-five minute time frame in which Garcia was in the shower; his statement was evidence of this material fact. Additionally, the statement is more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts. The Defendant argues that the Sena family phone records are the best evidence of what Sena did that day. The trial court found, however, that these records could not provide better evidence than

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court to claimed constitutional error); *cf. State v. Ross,* 1996 NMSC 031, 122 N.M. 15, 23, 919 P.2d 1080, 1088 (holding that confrontation issue was preserved for appellate review where the defendant timely objected on general constitutional grounds, in addition to evidentiary grounds, and distinguishing *Lucero* by noting that the defendant in that case made only evidentiary objections to hearsay evidence without suggesting that its admission would violate either the state or federal constitutions).

Sena's own knowledge of his actions that day, and we will not disturb the trial court's findings on this point.

Also, the interests of justice and the general purpose of the evidence rules are best served by admission of the Sena statement. The circumstances surrounding the statement indicate that the statement was trustworthy. Sena was a good friend of Defendant and it appears he had no motivation to lie about whether he talked to Defendant that morning. Sena was not a suspect in the case, and thus there would be no reason for the police to coerce a statement from Sena. Apparently, Sena had a clear memory about talking to Defendant that day, as he remembered that Defendant had called for him late that afternoon and had talked to Sena's mother. The statement was important for the jury to consider, as it went to the truth of what Defendant claimed he was doing while Garcia was in the shower.

Further, the statement's probative value is not substantially outweighed by its prejudicial effect to the Defendant. *See* Rule 11-403 NMRA 1997. Rule 11-403 guards against the danger of unfair prejudice against the defendant, but it does not necessarily shield the defendant from statements which may inculpate the defendant. *See State v. Woodward,* 121 N.M. 1, 6, 908 P.2d 231, 236 (1995) (citing 1 Kenneth S. Brown et al., *McCormick on Evidence* § 185, at 780 (John W. Strong ed., 4th ed.1992)). Sena's statement impeached Defendant's testimony that he was talking on the telephone for ten minutes while Garcia was showering; thus, the statement was highly probative. We cannot say that the trial court abused its discretion in finding that the statement was more probative than prejudicial. Moreover, we hold that the trial court did not abuse its discretion in admitting Sena's statement pursuant to Rule 11-804(B)(5).

ISSUE FIVE – ADMISSION OF AUTOPSY PHOTOGRAPHS

The trial court allowed the State to introduce two autopsy photographs of Christina. The defense objected to the admission of the photographs, claiming that they were not properly authenticated, irrelevant and unduly prejudicial. We hold that the trial court did not abuse its discretion in admitting the autopsy photographs.

Photographic evidence must fairly and accurately represent the depicted subject in order to satisfy the foundation requirement for authentication of photographs. *See State v. Henderson,* 100 N.M. 260, 261, 669 P.2d 736, 737 (Ct. App. 1983). The State elicited the testimony of Dr. Ornelas to authenticate the autopsy photographs. Defendant argues that Dr. Ornelas' testimony could not properly authenticate the photographs because Dr. Ornelas could not positively identify that the photographs were of Christina, and the State offered no other evidence to authenticate the photographs. Dr. Ornelas testified, however, that the photographs of Christina and the wound in Christina's perineum appeared substantially the same as when Dr. Ornelas had examined Christina prior to her death. The trial court found that the autopsy photographs were properly authenticated by Dr. Ornelas' testimony that the photographs accurately depicted Christina and the injury she observed on Christina's perineum. This testimony was sufficient to establish a foundation, and we cannot hold that the trial court abused its discretion in finding that the photographs were properly authenticated.

Nor will we disturb the trial court's finding that the photographs were relevant evidence. "Photographs are relevant and admissible for the purpose of clarifying and illustrating testimony." *State v. Gilbert,* 100 N.M. 392, 399, 671 P.2d 640, 647 (1983). Defendant argued that the photographs were irrelevant because Dr. Ornelas testified that the appearance of Christina's injury in the autopsy photograph did not appear the same as the injury would appear on a child who is alive. According to Defendant, the photographs could not assist the jury because the photographs did not illustrate Christina's actual injury. However, Dr. Ornelas testified that while the muscle tone in a dead child is different from that of a living child, the injury she saw when she examined Christina was similar to that appearing in the autopsy photographs. Since the jury heard conflicting testimony from medical personnel and experts regarding the size of the tear in Christina's anal-perineum area, the autopsy photographs became particularly relevant to show the jury the appearance of the injury.

Defendant also claims the autopsy photographs were unduly prejudicial. A trial court has great discretion in balancing the prejudicial impact of a photograph against its probative value. *State v. Pettigrew,* 116 N.M. 135, 139, 860 P.2d 777, 781 (Ct. App. 1993). Given the relevance of the photographs in light of the varied testimony regarding the size of Christina's injury, the trial court did not abuse its discretion by finding these photographs to be more probative than prejudicial.

ISSUE SIX – ADMISSION OF DEFENDANT'S PRIOR CONVICTION

In 1995, Defendant plead guilty to possession of stolen property. The stolen property was a 9-millimeter Uzi which was found under the seat of a car in an incident occurring in 1994. The crime of receiving a stolen firearm of less than $2500 in value is a fourth-degree felony. NMSA 1978, § 30-16-11 (I) (1987). The basic punishment for a fourth-degree felony is eighteen months imprisonment. NMSA 1978, § 31-18-15 (A)(6) (1994). Over the defense's objection, the trial court allowed the State to cross-examine Defendant about the conviction. Defendant argues that the trial court abused its discretion by allowing the State to cross-examine Defendant on his prior conviction for possession of a stolen firearm. Defendant claims that the probative value of the evidence did not outweigh its prejudicial effect. *See* Rule 11-609 NMRA 1997; Rule 11-403 NMRA 1997. We disagree.

The admission of a prior conviction of a witness is reviewed on appeal only for abuse of discretion. *State v. Trejo,* 113 N.M. 342, 347, 825 P.2d 1252, 1257 (Ct. App. 1991). Felony convictions punishable by imprisonment of a year or more, and crimes involving dishonesty are probative of credibility and may be admissible to impeach the defendant if the probative value of admitting the evidence outweighs its prejudicial effect to the defendant. Rule 11-609(A). We need not address whether the crime of receiving a stolen firearm is a crime involving dishonesty, since Rule 11-609(A)(1) "contemplates admission into evidence of felony convictions, regardless of whether they concerned dishonesty or false statement." *State v. Lucero,* 98 N.M. 311, 313, 648 P.2d 350, 352 (Ct. App. 1982).

The trial court should consider the following factors when deciding whether to admit evidence of a felony conviction under Rule 11-609(A)(1):

> (1) the nature of the crime in relation to its impeachment value as well as its inflammatory impact; (2) the date of the prior conviction and witness's subsequent history; (3) similarities, and the effect thereof, between the past crime and the crime charged; (4) a correlation of standards expressed in Rule 609(a) with the policies reflected in [Rule 11-404 NMRA 1997]; (5) the importance of the defendant's testimony, and (6) the centrality of the credibility issue.

Lucero, 98 N.M. at 313-14, 648 P.2d at 352-53 (citations omitted).

In this case, credibility was a critical and central issue for the jury to consider. Defendant's version of what occurred varied greatly from the version Garcia testified to at trial. Moreover, the crime used to impeach Defendant was not similar to the charges Defendant faced at trial, and Defendant had only recently plead guilty to the felony. Keeping the above factors in mind, we cannot hold that the trial court abused its discretion by allowing the State to cross-examine Defendant on his prior conviction.

ISSUE SEVEN – PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

At trial, the prosecutor referred to the stolen firearm as a "tec-9 machine gun." On appeal, Defendant claims the reference was inflammatory and was being used as substantive evidence of Defendant's guilt. Defendant argues that this reference amounted to prosecutorial misconduct that denied Defendant due process and a fair trial. Again, we disagree.

As explained above, the State was allowed by the trial court to cross-examine Defendant about his prior conviction. The State asked Defendant whether he had pled guilty to receiving stolen property with a firearm, to which Defendant replied "yes." On redirect, defense counsel elicited Defendant's testimony that the crime was possession of a stolen firearm, rather than possession of stolen property with a firearm, as the prosecutor had characterized it. Defense counsel, over objection, was permitted to ask questions of Defendant which would allow Defendant to explain the circumstances of the possession of a stolen weapon. On re-cross, the State asked if the gun was a 9 millimeter Uzi, to which Defendant answered "it was an Uzi-Tec-9." Since the trial court allowed Defendant the opportunity to explain the circumstances of the conviction on redirect, the defense opened the door for the State to also ask about the facts of the crime. Based on Defendant's answer, it was not improper for the prosecutor to refer to the firearm in closing argument.

Moreover, the State did not use this conviction as substantive evidence of Defendant's guilt. In closing argument, the defense characterized Defendant as "the hardest working boy you'll ever meet." Then the defense stated: "Now sure, he had a little problem. He was making out with his girlfriend, and they found a gun in his car. And the gun turned out to be stolen. That's about the only thing, and if he goes through life in Albuquerque with only that, let me tell you, he merits an award the way the youth goes in this town."

In rebuttal, the State argued that the defense was trying to portray Defendant as "this guy, hard working you know, doesn't really get in trouble. He was caught with a Tec-9, Tec-9, nine millimeter. No big deal if that's all there is . . . This is not a mild-mannered young man. This is not the saint the defense wants you to see. This man raped and killed this baby." We agree with the State that the prosecutor's closing argument was a rebuttal of the defense's characterization of Defendant as a hard-working man who had only a single run-in with the law. The defense's reference to Defendant's character and conviction clearly opened the door for the prosecution to do the same. Thus, there was no error in the prosecutor's remarks.

ISSUE EIGHT - DOUBLE JEOPARDY

Defendant argues that his convictions for felony murder and criminal sexual contact of a minor, and for felony murder and intentional child abuse resulting in death, are improper multiple punishment and violate his protection against double jeopardy. The Double Jeopardy Clause protects against both successive prosecutions and multiple punishments for the same offense. *Swafford v. State,* 112 N.M. 3, 13, 810 P.2d 1223, 1233 (1991). The State has acknowledged that, should we affirm the felony murder conviction, the conviction for intentional child abuse resulting in death should be vacated.[2] Because we

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[2] In *State v. Pierce,* 110 N.M. 76, 85, 792 P.2d 408, 417 (1990), we held that it was improper multiple punishment for a defendant to be sentenced for child abuse resulting in death and first-degree murder where the state did not charge or offer proof that the acts of child abuse occurred at a time period different from the incident which resulted in the child's death. In its Answer Brief, the State recognized that *Pierce* controls and at oral argument, the State conceded that the conviction

(Continued on following page)

affirm Defendant's felony murder conviction, we remand this case to the district court with the instruction that Defendant's conviction for intentional child abuse resulting in death be vacated.

The more problematic claim of double jeopardy involves Defendant's convictions for felony murder and criminal sexual contact. Defendant claims that under New Mexico law, he cannot be convicted of both felony murder and the underlying felony. *See State v. Contreras,* 120 N.M. 486, 491, 903 P.2d 228, 233 (1995) (holding that double jeopardy was violated where defendant's conduct for murder and underlying felony of armed robbery was unitary).

We use the two-pronged *Swafford* test to analyze Defendant's double jeopardy claim. 112 N.M. at 13, 810 P.2d at 1233. The court first inquires "whether the conduct underlying the offenses is unitary," that is, whether the same conduct violates two or more different statutes. *Id.* If the conduct is unitary, the court applies the second inquiry, asking whether the Legislature intended to impose multiple punishments for the unitary conduct. *Id.* We answer the question of whether the Legislature intended multiple punishments for unitary conduct by asking whether each statute proscribing the offense requires proof of a fact the other does not. *Id.* at 14, 810 P.2d at 1234 (adopting in part the elements test articulated by the United States Supreme Court in *Blockburger v. United States,* 284 U.S. 299, 304, 76 L.Ed. 306, 52 S. Ct. 180 (1932)). If "one statute is subsumed within the other, the

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for intentional child abuse resulting in death should be vacated should the court affirm the felony murder conviction.

inquiry is over and the statutes are the same for double jeopardy purposes . . . . " *Swafford,* 112 N.M. at 14, 810 P.2d at 1234.

The issue of unitary conduct in this case is pivotal. If the conduct of Defendant is deemed unitary, Defendant could not be convicted for both felony murder and criminal sexual contact of a minor since the underlying offense of criminal sexual contact necessarily would be subsumed as an element of the offense of felony murder. The resolution of the unitary conduct analysis turns upon which versions of the events – Defendant's or the State's – is best supported by the evidence. *See State v. Cooper,* 1997 N.M. LEXIS 452, 1997 NMSC 58, 949 P.2d 660, NMSC 22,504, ¶ 59 (Nov. 3, 1997).

We have stated that conduct is not unitary "if the defendant commits two discrete acts violative of the same statutory offense, but separated by sufficient indicia of distinctness." *Swafford,* 112 N.M. at 13, 810 P.2d at 1233. The court may consider as "indicia of distinctness" the separation of time or physical distance between the illegal acts, "the quality and nature" of the individual acts, and the objectives and results of each act. *Id.* at 13-14, 810 P.2d at 1233-34. "While felony murder requires that another felony has occurred, 'if the conduct is separate and distinct, inquiry is at an end.'" *State v. Kersey,* 120 N.M. 517, 523, 903 P.2d 828, 834 (1995) (citing *Swafford,* 112 N.M. at 14, 810 P.2d at 1234 and holding that offenses of kidnapping and felony murder were not unitary because conduct required to establish kidnapping was complete before act of murder).

In this case, the State concedes that there was no significant separation of events by time or space. The evidence shows that the criminal sexual contact which caused the tear occurred within the same twenty-five minutes of the fatal blow to the head. Although the acts resulting in the convictions for felony murder and criminal sexual contact may have been committed during a brief chain of events, we agree with the State that the acts were distinct and separate. *Cf. Cooper,* NMSC 22,504, ¶¶ 60-62, slip op., (Nov. 3, 1997) (holding that acts leading to convictions for aggravated battery and first degree, felony murder were not unitary where initial act of battery did not result in victim's death, and thus the act of battery was separate conduct distinguishable from the acts resulting in murder); *State v. Livernois,* 1997 NMSC 019, ¶ 21, 123 N.M. 128, 934 P.2d 1057 (holding that acts leading to convictions for aggravated burglary and first-degree, felony murder were not unitary where shooting occurred shortly after defendant completed the offense of aggravated battery by entering a bowling alley with the requisite intent to commit a felony while armed). Here, the quality and the nature of the acts, as well as the objects and results involved, are different. The act leading to the offense of criminal sexual contact resulted in injury to Christina's genital area. On the other hand, the act leading to the offense of felony murder involved an intentional act of killing or creating a strong probability of death or great bodily harm to Christina, and resulted in blunt and fatal force to Christina's head.

The fatal blow to Christina's head was caused by conduct separate from the contact to Christina's genital area. Neither contact was necessary to accomplish the other. This case is unlike *State v. Campos,* 1996 NMSC 043, where the predicate felony of criminal sexual penetration was the single act that caused the victim's death.

Here, the conduct involved in the criminal sexual contact was separate conduct that did not cause Christina's death. We conclude that Defendant's act leading to the conviction of criminal sexual contact (causing injury to Christina's perineum) was a distinct and separate act when compared to his act leading to the conviction of felony murder (causing injury to Christina's head). Thus, Defendant's conduct was not unitary and his conduct constituted two separate acts for which the Legislature has proscribed two separate offenses.

The version of the events best supported by the evidence is that Defendant's acts of criminal sexual contact and felony murder were not unitary. Therefore, we need not address the second *Swafford* factor. Defendant may be convicted and sentenced for both felony murder and criminal sexual contact of a minor.

CONCLUSION

We affirm Defendant's convictions for felony murder and criminal sexual contact in the third degree. We remand this case to the district court with the directions that Defendant's conviction for intentional child abuse resulting in death be vacated, and that Defendant's judgment and sentence should be amended to reflect sentences for both criminal sexual contact of a minor and felony murder.

IT IS SO ORDERED.

PATRICIO M. SERNA, Justice

WE CONCUR:

GENE E. FRANCHINI, Chief Justice

JOSEPH F. BACA, Justice

PAMELA B. MINZNER, Justice

M. CHRISTINA ARMIJO, Judge

New Mexico Court of Appeals

(sitting by designation)

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. CRCR 94-~~4776~~ 3049
DA#: 94-03049

STATE OF NEW MEXICO,

Plaintiff,

vs.

Christopher Mora,
DOB: 03-14-76
SSN: 585-31-9274

Defendant.

JUDGMENT, SENTENCE AND COMMITMENT

(Filed Apr. 15, 1996)

On March 21, 1996, this case came before the Honorable W. JOHN BRENNAN, District Judge, for sentencing, the State appearing by STAN WHITAKER and LISA TRABAUDO, Assistant District Attorney, the Defendant appearing personally and by his attorneys, Leon Taylor and Cliff McIntyre, and the Defendant having been convicted on February 5, 1996 pursuant to a Guilty Verdict, accepted and recorded by the Court, of the offenses of:

1. Count 1 of Indictment CR 94-03049 First Degree Murder (Felony Murder), with the underlying offense being Criminal Sexual Contact, on or about the 24th day of November 1994.

2. Count 3 of Indictment CR 94-03039 Criminal Sexual Contact in the third degree (Child Under 13), on or about the 24th day of November, 1994.

3. Count 4 of Indictment Cr 94-03049 Child Abuse (Intentionally Caused) (Death or Great Bodily Harm) on or about the 24th day of November, 1994.

The Defendant is hereby found and adjudged guilty and convicted of said crimes, and is sentenced to the custody of the Corrections Department to be imprisoned for the term of life.

THEREFORE, You, the Corrections Department of the State of New Mexico are hereby commanded to take the above-named Defendant in custody and confine him for the above term.

Defendant is to receive credit for 18 days pre-sentence confinement and for post-sentence confinement until delivery to the place of incarceration.

IT IS FURTHER ORDERED that the Defendant be placed on parole for 5 years after release and be required to pay parole costs.

/s/ W. John Brennan
W. JOHN BRENNAN
DISTRICT JUDGE

APPROVED:

/s/ Stan Whitaker
Assistant District
Attorney

Telephonic Approval by: Cliff McIntyre on 4/2/96
Attorney for Defendant